Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ODIE WASHINGTON,

Petitioner,

v.

ANTHONY EARL HALL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether a federal habeas court exceeds the scope of habeas review when it negates a state sentencing judge's explicit finding, after hearing additional mitigation evidence at a post-conviction hearing, that, notwithstanding the additional mitigation, he still would have sentenced the defendant to death.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Odie Washington, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals (App. A1-26) is reported at 106 F.3d 742. The opinion of the district court (App. B1-76) is reported at 916 F.Supp. 1411. The opinions of the state supreme court (App. C1-15 and D1-44) are reported at 157 Ill.2d 324 and 114 Ill.2d 376.

JURISDICTION

The Court of Appeals entered judgment on February 4, 1997 (App. A1); rehearing was denied on March 10, 1997. (App. A27-28) This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

STATEMENT OF THE CASE

On April 17, 1984, a McLean County, Illinois, judge found Anthony Hall guilty of the murder of Frieda King. (App. B2) A hearing was held before the same judge to determine if Hall was eligible for the death penalty. The judge found Hall eligible pursuant to the following statutory aggravating factor: that the victim was an employee of an institution of the Department of Corrections, and was killed in the course of performing her official duties. Ill. Rev. Stat. 1983, Ch. 38, par. 9-1(b)(2) (now 720 ILCS 5/9-1(b)(2)). (App. D2) After hearing both aggravation and mitigation pursuant to *Ill.Rev.Stat.* 1983, Ch. 38, par. 9-1(c) (now ILCS 5/9-1(c)), the judge found "no mitigating factors sufficient to preclude imposition of the death sentence" and sentenced Hall to death. *Ill.Rev. Stat.* 1983, Ch. 38, par. 9-1(h) (now 720 ILCS 5/9-1(h)). (App. D2) The Illinois Supreme Court affirmed the conviction and sentence. *People v. Hall*, 114 Ill.2d 376, 499 N.E.2d 1335 (1986) *cert. denied*, 480 U.S. 951, *reh'g denied*, 481 U.S. 1060 (1987). (App. D1-44)

Hall then sought post-conviction relief and was appointed new counsel. On October 5, 1989, counsel filed a post-conviction petition before the same McLean County judge alleging, among other things, ineffectiveness of counsel at sentencing for failing to locate and present additional character witnesses who would have testified at the initial sentencing hearing. (App. C2) On January 5 and April 27, 1990, the judge held an evidentiary hearing on the claim. (App. C2) At the evidentiary hearing, Hall's new counsel presented two witnesses and, by stipulation of the parties, affidavits from six other persons, all of whom attested to various positive aspects of Hall's

character. (App. C10) After hearing the additional mitigation, the judge ordered briefing by both parties on the issue of sentencing counsel's effectiveness. *See Strickland v. Washington*, 466 U.S. 668 (1984). (App. C10)

On March 6, 1991, in a twelve page written order, the judge found that sentencing counsel had not been ineffective because (1) counsel's performance was caused, in large part, by Hall's refusal to cooperate with him, but, more importantly, (2) even if counsel had presented the additional mitigation at the initial sentencing, "there was no reasonable probability that the sentence would have been different." (App. C11) The judge referred to some of the "new" mitigation evidence and set forth his reasons for declining to find *Strickland* prejudice:

> Affidavits filed by Clarietha Hall, the defendant's spouse, and Annie Rodgers, the defendant's mother, indicates [sic] that both of them were willing and able to testify at the sentence hearing and that neither was called to testify. It should, however, be noted that neither of these relatives of the defendant attended any of the pre-trial hearings or the trial itself. Neither states that she offered to testify at the sentence hearing and there is no showing that the defendant ever requested that they be called to testify or revealed information to counsel which would have enabled counsel to contact them. Their indifference during the trial could certainly have been read to be a sign of hostility toward the defendant or of fear of him.
>
> The affidavit of Father Richard Means, a Catholic priest, indicated that he was willing and able to testify in the defendant's behalf at his sentence hearing. He also contacted defense counsel

on a number of occasions and offered to testify for Hall. He was not called. However, Hall was a member of the Jehovah's Witnesses faith and his own clergyman, Lloyd Shaddle, under whose leadership Anthony Hall had studied the Bible, was called and did testify in Hall's behalf. If Father Means had been called, he would have testified that Hall was honest, sensitive, sociable, respectful, industrious and pleasant.

Patricia Rolfe Hunt submitted an affidavit that Anthony Hall formerly babysat for her children. He once saved the life of one of her children when he began to choke upon a chicken bone. There is no showing that she ever contacted defense counsel before the sentence hearing or that they were made aware of her existence or the nature of her testimony.

A former employee of the Board of Education stated that he would have testified for the defense if called. He found Hall to be friendly and pleasant and eager to learn. He also was not contacted.

Finally, Thomas Connor, a defense witness at the trial, submitted his affidavit that he would have returned to testify at the sentence hearing. He would have testified that Hall was dedicated to his work at the correctional center food service.

Without exception, the affiants would have testified about Hall's character and personality. None of the affiants could offer testimony related to the specific offense of which Hall was convicted or testimony which would tend to prove one of the mitigating factors set forth in Section 9-1(c). Certainly the court was interested in

> learning as much about Mr. Hall's character as possible. However, some of the affiants' testimony would have merely supported the court's own observations concerning Anthony Hall's character commencing with an initial conference with him on February 23, 1983, and continuing through the conclusion of the sentence hearing a little more than a year later. The court was exposed to Hall's friendliness and sociability. At times he could be very respectful and pleasant to be near. He seemed genuinely interested in court personnel and frequently conversed easily with them at recesses.
>
> If the affiants had been called to testify and if their testimony had been consistent with their affidavits, there is no reasonable probability that the sentence would have been different. *See Strickland v. Washington*, 466 U.S. 668, at 686, 104 S.Ct. 2052, at 2063, 80 L.Ed. 2d 674 (1984). Accordingly the court finds that the defendant was not denied effective assistance of counsel at the sentencing hearing.

(Judge Caisley's Order in *People v. Hall*, No. 83 CF 182, March 6, 1991). The Illinois Supreme Court affirmed the sentencing judge's denial of post-conviction relief. *People v. Hall*, 157 Ill.2d 324, 626 N.E.2d 131 (1994), *cert. denied*, 115 S.Ct. 507:

> Applying [*Strickland*] principles to the present case, we conclude that defendant has failed to show that his trial counsel was ineffective under the sixth amendment. At defendant's death sentencing hearing, the aggravating evidence included certified copies of defendant's earlier convictions for rape, armed violence, and two armed robberies; and the testimony of two of defendant's past victims. [Citation omitted.] The State

> also presented evidence that defendant, while in prison, held an inmate while two other inmates stabbed him. The trial judge heard mitigating evidence from defendant himself and two others. [Citation omitted.]
>
> The trial judge, in his order denying defendant's post-conviction petition, described the mitigating testimony presented at the death sentencing hearing as background and character evidence. The judge considered the mitigating evidence presented at the post-conviction hearing to have been essentially cumulative. The trial judge found that had defendant's post-conviction witnesses and affiants testified at the sentencing hearing, there was no reasonable probability that the sentence would have been different. After carefully reviewing the record, we cannot say that this finding was manifestly erroneous.

(App. C11)

Next, Hall sought federal habeas relief. He filed his amended petition on July 11, 1995. (App. B3) The United States District Court for the Central District of Illinois, applying *de novo* review, denied habeas relief on all claims, including the sentencing counsel claim. *Hall v. Washington*, 916 F.Supp. 1411 (N.D.Ill. 1996). (App. B1-76) Hall appealed. The Court of Appeals for the Seventh Circuit affirmed the district court's denial of habeas relief except for that part that pertained to the ineffective assistance of sentencing counsel claim. The court granted the writ in part for purposes of a new sentencing hearing, finding that the sentencing judge's conclusion that "there was no reasonable probability that the outcome would have been different" was "unreasonable." *Hall v. Washington*, 106 F.3d 742 (1997). (App. A22)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE SEVENTH CIRCUIT, IN HOLDING THAT HALL WAS PREJUDICED BY THE PERFORMANCE OF HIS SENTENCING COUNSEL, IMPROPERLY REWEIGHED THE IDENTICAL EVIDENCE PRESENTED TO THE FACTFINDER.

The Seventh Circuit far exceeded the proper scope of habeas review when it contradicted the sentencing judge's explicit finding that, despite the additional mitigation he heard at a post-conviction hearing, he would still impose the death penalty. That the Seventh Circuit misunderstood its role in this case is clear:

> *In our view*, there is a "reasonable probability" that the evidence Hall's lawyers never found might have resulted in a no-death finding by the court had it been presented at the proper time.

(App. A22) (emphasis added) The panel's substitution of its "view" in place of the state court's express factual findings to the contrary is an impermissible intrusion into the province of not only the state factfinder but of the state reviewing court as well.

The Seventh Circuit's analysis in this case is especially egregious because it purports to decide the case under the decidedly more "deferential" standard of review of state court merits determinations as set forth in 28 U.S.C. § 2254(d) as amended by the Antiterrorism and Effective Death Penalty Act of 1996. (App. A12-14) *See Lindh v. Murphy*, ___ U.S. ___, 1997 U.S. LEXIS 3998, n.7 (holding "deferential" review under Act inapplicable to cases—such as this one—pending prior to effective date of Act). The Seventh Circuit's analysis in this case is wrong under either *de novo* or "deferential" review.

In *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990), this Court decided that a federal court could not make a *de novo* review of the evidence supporting an Arizona court's finding of a facially constitutional aggravating circumstance in a capital case. *Id.* 497 U.S. 764, 773-74. In that case, the Ninth Circuit vacated Jeffers' death sentence because it found that Arizona had applied the "especially heinous . . . or depraved [aggravating] circumstance" unconstitutionally to Jeffers. *Id.* 497 U.S. at 772. This Court reversed, holding that "the Court of Appeals . . . erred in conducting a de novo, case-by-case comparison of the facts of [other] cases with the facts of [Jeffers'] case." *Id.* 497 U.S. at 778. Such *de novo* review does not "respect . . . a state court's findings of fact and application of its own law." *Id.* 497 U.S. at 781. This Court further held that even if the state court's application of its own law were a "mixed" question of law and fact, the question is one solely of state law, and thus not cognizable in federal habeas proceedings. *Id.*, 497 U.S. at 782-83.

Principles of federalism and comity require that *Lewis* be applied to the Illinois sentencing court's "findings of fact and application of its own [death penalty] law" in this case. Although, in *Strickland v. Washington*, 466 U.S. 668 (1984), this Court instructed that "in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact," but is rather a "mixed question of law and fact[,]" it nonetheless acknowledged that a state court necessarily must make "findings of fact" in the course of deciding the ineffectiveness claim. *Id.*, 466 U.S. at 697. Such "factual findings" must be presumed correct by a federal habeas court. *Id.*, 466 U.S.

at 697. Certainly, a judge's reweighing of aggravation and mitigation—as occurred in this case—is entitled to the same deference.

Here, it was the state trier of fact that decided that, despite counsel's failure to introduce certain mitigation at the original sentencing hearing, Hall was not prejudiced because there was no reasonable probability that the outcome would have been different. Essentially, after hearing Hall's presentation of additional mitigation, the judge reweighed the evidence and found that there was still "no mitigation sufficient to preclude the death penalty." Such "weighing" is the province of the factfinder, not a reviewing court; and certainly not a federal habeas court. *Lewis*, 497 U.S. at 781 ("It is not our role to reexamine the trial court's findings of fact, which have been affirmed by the [state] Supreme Court."). The Illinois judge's finding on post-conviction that he would not have changed his initial verdict that "there are no mitigating factors sufficient to preclude the death penalty," is no less a factual finding than was Arizona's finding that Jeffers' crime was "especially cruel and heinous." Alternatively, even if the judge's determination under Illinois law (720 ILCS 5/9-1(h)) that "there is no mitigation sufficient to preclude the imposition of death" is a "mixed" question, any such determination is a question of Illinois law, errors of which are not cognizable in federal habeas proceedings. *Id.*, 497 U.S. at 782-83.

Indeed, in *Lewis*, this Court concluded that the most appropriate standard for reviewing a state court's application of its own aggravating circumstances in a capital case is the "rational factfinder" test first set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979) (in reviewing a

state court's finding that the evidence was sufficient to convict, a federal habeas court must decide whether any rational factfinder could have found the facts sufficient beyond a reasonable doubt). Such a standard is consistent with the most fundamental notions of federalism and comity with respect to state court judgments. *Id.*, 497 U.S. at 781 ("we have never required federal courts 'to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language.'" (citation omitted)).

This petition provides this Court with the opportunity to reinforce those same principles of federalism and comity in the context of states' applications of their own constitutional death penalty laws. The sentencing judge's conclusion in this case that "there was no mitigation sufficient to preclude the death penalty" is entitled to the same deference that was given in *Jackson* to the factfinder's conclusion that the evidence was sufficient to convict and in *Lewis* to the factfinder's determination that an aggravating circumstance applied to the facts of that case. That "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony." *Id.* 497 U.S. at 782. It protects those findings that are solely within the province of the factfinder "through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." *Id.* 497 U.S. at 782 (citing *Jackson* at 319).

Despite the sentencing judge's clear statement that the additional mitigation would not have changed his mind, the federal court chose to interpose its own speculation

of what the trial court might have done: "The trial court might have been impressed by the fact that a corrections employee was willing to speak up for the killer of another corrections employee." (App. A22) This suggestion ignores the record. The judge clearly said he was not impressed. The federal court's finding of "unreasonableness" is, itself, unreasonable.

This Court's intervention is warranted for yet another reason. As stated above, the Seventh Circuit purported to decide this case under the recently amended 28 U.S.C. § 2254(d)(1) (App. A12-14), although it is now clear that the *de novo* standard was appropriate in this case. *Lindh v. Murphy*, 1997 U.S. LEXIS 3998. While not applicable in this case, the panel's interpretation of deference under § 2254(d)(1) would render that section meaningless. *Compare* analysis in this case to that of *Gomez v. Acevedo*, 106 F.3d 192, 197-200 (7th Cir. 1997) (in which the same court, one day earlier, interpreted section 2254(d)(1) to require even more deference to the state court's application of the already very deferential *Jackson v. Virginia* standard). *See also Drinkard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir. 1996). Thus, the important question in this case—whether it be decided under *de novo* or deferential review—needs this Court's clarification.

CONCLUSION

Because the Seventh Circuit's decision violates the most fundamental notions of federalism and comity afforded the states in the application of their own constitutional death penalty laws, Petitioner, Odie Washington, respectfully requests that this Court grant Certiorari either by plenary consideration or summary reversal.

Respectfully submitted,

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APPENDICES

APPENDIX A

ANTHONY HALL, Petitioner-Appellant, v.
ODIE WASHINGTON, Director, Respondent-Appellee.

No. 96-1704

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

106 F.3d 742; 1997 U.S. App. LEXIS 1833

November 21, 1996, Argued
February 4, 1997, Decided

SUBSEQUENT HISTORY: [*1] Rehearing and Suggestion for Rehearing En Banc Denied March 10, 1997, Reported at: 1997 U.S. App. LEXIS 4735.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of Illinois. No. 95-1125. Joe Billy McDade, Judge.

DISPOSITION: REVERSED in part and the case is REMANDED for the issuance of a writ of habeas corpus requiring a new sentencing hearing for petitioner Anthony Hall.

COUNSEL: For ANTHONY HALL, Petitioner-Appellant: Richard E. Cunningham, Chicago, IL USA. Anne E. Carlson, Chicago, IL USA.

For ODIE WASHINGTON, Director of the Illinois Department of Corrections, Respondent-Appellee: Arleen C. Anderson, Bradley P. Halloran, OFFICE OF THE ATTORNEY GENERAL, Chicago, IL USA. Penelope Moutoussamy George, OFFICE OF THE ATTORNEY GENERAL, Criminal Appeals Division, Chicago, IL USA.

JUDGES: Before CUMMINGS, ROVNER, and DIANE P. WOOD, Circuit Judges.

OPINION BY: DIANE P. WOOD

OPINION: DIANE P. WOOD, Circuit Judge. On February 8, 1983, Anthony Hall, then an inmate at Pontiac Correctional Center, fatally stabbed Frieda King and stuffed her body in a closet next to a large walk-in freezer in the prison kitchen. King had been the civilian supervisor of the kitchen at Pontiac. After a brief investigation, Hall was charged with the murder and went to trial before Judge William T. Caisley of the Circuit [*2] Court for Livingston County, Illinois. After a trial to the court, Judge Caisley found Hall guilty of murder and, following a sentencing hearing held six weeks later for which Hall also purportedly waived his right to a jury, he sentenced Hall to death. Hall appealed his conviction and sentence to the Illinois Supreme Court, which affirmed. People v. Hall, 114 Ill. 2d 376, 499 N.E.2d 1335, 102 Ill. Dec. 322 (Ill. 1986) ("Hall I"). He then filed a postconviction petition pursuant to Illinois law, 725 ILCS 5/122-1 et seq. (1994), which Judge Caisley denied following an evidentiary hearing. That denial was also affirmed by the Illinois Supreme Court. People v. Hall, 157 Ill. 2d 324, 626 N.E.2d 131, 193 Ill. Dec. 98 (Ill. 1994) ("Hall II").

Once his state remedies were exhausted, Hall filed a petition for a writ of habeas corpus in the district court pursuant to 28 U.S.C. § 2254. He presented a total of seven alleged constitutional violations (one of which had ten sub-parts), some of which allegedly invalidated his conviction and his sentence, and some just the sentence. The district court denied his petition and he now appeals

to this Court, attacking the entire proceeding on two grounds and his sentence on three additional grounds. Although [*3] we find no reversible error in the district court's judgment denying habeas relief on the case as a whole, we conclude that Hall received ineffective assistance of counsel at sentencing. He is therefore entitled to a writ of habeas corpus limited to his sentence.

I

The pre-trial and trial proceedings in Hall's case were unusually contentious. Hall initially informed the court he would obtain private counsel, but when he was unsuccessful, the court, on March 8, 1983, appointed David Ahlemeyer, the Public Defender of Livingston County, to represent him. The relationship between Ahlemeyer and Hall was poor from the outset. After his appointment, Ahlemeyer did not visit Hall to discuss his case for over three months, during which time Hall fruitlessly attempted to reach Ahlemeyer by phone and through letters. Although the State had begun to provide Ahlemeyer with discovery materials, Ahlemeyer did nothing to share this information with Hall. Unhappy with his attorney's services, Hall began again to search for another lawyer. He sent several requests to the court for new counsel, in which he described Ahlemeyer's lack of attention to the case, but the court decided that it would appoint [*4] another attorney only if Hall could show that Ahlemeyer had a conflict of interest. On June 29, 1983, Ahlemeyer tried (apparently for the first time) to meet with Hall to discuss the case, but Hall refused to see him. This prompted Ahlemeyer to move on July 11, 1983, to withdraw from the case. Consistently with its earlier ruling,

the court again denied the motion because Ahlemeyer did not allege a conflict of interest.

Matters went from bad to worse between Hall and Ahlemeyer following the July motion. In late September, Ahlemeyer sought a second meeting with Hall, which Hall again refused to grant. At a fitness hearing held on October 4, 1983, Ahlemeyer informed the court that Hall was being uncooperative. Hall replied threateningly that his refusal to cooperate was a rational act and implied that if Ahlemeyer ever came "within an arm's length" of him, he would assault the lawyer. The court found Hall was fit for trial and denied a second motion to withdraw presented by Ahlemeyer. At that time, however, the court offered to appoint Steven Skelton, the Public Defender of McLean County, as additional counsel. Hall initially refused the offer, but later (after an unsuccessful effort [*5] to convince the court to appoint a private attorney he had found) he acquiesced and the court appointed Skelton. In the course of three more court appearances between December 5, 1983, when Skelton was appointed, and February 21, 1984, when the trial began, nothing in the record indicates that Hall was being uncooperative.

Hall's behavior problems were not, however, at an end. Following jury selection, Hall informed the court that he wished to proceed pro se because his attorneys refused to call two particular witnesses on his behalf. Hall, Ahlemeyer, Skelton, and the judge adjourned to chambers to discuss the matter outside the presence of the jury. Judge Caisley warned Hall of the dangers of proceeding unrepresented in a capital case, while Ahlemeyer and Skelton objected to Hall's proposal that he proceed pro se with backup help from the lawyers. Judge Caisley

then began to ask Hall about the witnesses, and in his own words, the following events took place: . . . let the record further show that defense counsel, Steven Skelton, has just been struck on the head by the defendant with a chair and that the court has also been struck by the defendant on the head with his fist . [*6] . . .

Hall I, 499 N.E.2d at 1339. Hall had also hurled a chair at Ahlemeyer before he was restrained. When court reconvened, the court denied Hall's request to represent himself and ordered that Hall be shackled for the duration of the trial. Skelton and Ahlemeyer moved to withdraw, arguing that the attorney-client relationship was now irretrievably lost, and asked the judge to recuse himself. The court denied both requests, the jury returned to the courtroom, and the trial proceeded with Hall seated away from his attorneys, shackled and with several guards standing behind him.

During the prosecution's opening statement, Hall personally interrupted the proceedings to tell the court that he wanted to waive his right to a jury. The judge replied that he would consider the waiver request after opening statements. Following completion of the State's opening statement, the judge explained the seriousness of the charges and the range of penalties Hall faced. He told Hall that if Hall waived a jury, the judge would determine both the facts and the law in the case. When Hall realized that the court intended to accept his waiver only for the guilt/innocence stage of the proceedings, [*7] he attempted to waive a jury in advance for any possible sentencing proceedings that might follow. After a somewhat lengthy exchange with Hall, his lawyers, and the prosecutor, the court decided to accept Hall's waiver only for the guilt/innocence stage of the trial and to reserve

decision on the request to waive the jury for sentencing. At no time during this exchange did anyone discuss the operation of capital sentencing juries under Illinois law.

On March 2, 1984, the court announced its finding that Hall was guilty of the murder. The State promptly reiterated its intention to seek the death penalty and requested that Hall decide whether to have a jury make the capital sentencing determination. Noting that this was a decision Hall might wish to discuss with counsel, the court recessed for an hour. When court reconvened, the judge opened by reciting the sections of the Illinois Criminal Code that would govern the sentencing phase and by noting that Hall had a right to a jury determination of his penalty. The judge then asked Hall directly whether he had "had an opportunity to discuss with [his] counsel whether or not [he] desired to have a jury determination of whether capital [*8] punishment or some other lawful sentence is to be imposed." Hall replied "no," which prompted the court to order another short recess at which he could discuss the issue with counsel. Hall and his lawyers talked for a mere 40 seconds, during which time they told Hall simply that he had a right to a jury at sentencing. Neither of his defense attorneys advised Hall that under Illinois law, while it takes a unanimous jury to impose death, it takes the vote of only one juror to ensure that a defendant will be spared that penalty. 720 ILCS 5/9-1(g); Emerson v. Gramley, 91 F.3d 898, 907 (7th Cir. 1996). Nor did they request more time to consult with Hall. After the 40-second consultation between Hall and his counsel, the court accepted Hall's sentencing jury waiver.

At Ahlemeyer's request, the court chose the later of two available dates for the capital sentencing hearing,

scheduling it for April 17, 1984. Just as the sentencing hearing was about to begin on that date, Hall informed the court that he wanted to withdraw his waiver of a jury. He explained that he had just learned (from a different lawyer, Mr. Charles Schiedel, Deputy Defender of the Supreme Court Unit of the State Appellate [*9] Defender's Office) that Illinois law requires a jury unanimously to agree on the death penalty before it can be imposed. In other words, he had not realized at the time of his waiver that a single hold-out juror would mean the difference between execution and life in prison. The court refused to allow him to change his mind, apparently because the first jury (which had been selected but not used for the February trial) had been discharged on March 2, even though the court had never decided whether that jury would have been used for sentencing.

Six weeks elapsed between the conviction and the sentencing hearing—six weeks in which Hall's lawyers did practically nothing to advance his case. They did not contact him even a single time to discuss the upcoming sentencing hearing or to inquire about possible mitigating evidence or witnesses who might be available to testify on his behalf. They did not return telephone calls or write back to individuals who were volunteering to offer mitigating testimony. Due to their neglect, they never learned about a number of readily available mitigation witnesses. They never explained to Hall the importance of the sentencing phase of a capital case, [*10] the unique role of the sentencing jury, or that a probation officer would visit him to conduct a pre-sentence investigation with whom he should cooperate. Because he had not been told what the probation officer's role was, Hall refused to speak with her when she came to

the prison to meet with him. Even after that incident, about which Ahlemeyer knew, Ahlemeyer did not attempt to contact Hall to advise him to be more cooperative with her.

During the state post-conviction hearing, it became apparent that counsels' utter disregard of the case caused them to overlook a substantial amount of mitigating evidence, both in quantity and in quality. The later hearing revealed the existence of ten people who would have testified for him at his sentencing hearing but who had not been contacted or not been asked to testify by either Skelton or Ahlemeyer. For example, Thomas O'Connor had been an employee of the Illinois Department of Corrections and had met Hall while working at Pontiac. O'Connor was willing to testify that Hall had been very helpful to O'Connor and other Food Service employees and that Hall was loyal, cooperative, and reliable. Counsel clearly knew of O'Connor's availability, [*11] because he had testified as a defense witness at trial; a simple telephone call would have revealed whether O'Connor was willing to testify on Hall's behalf for purposes of sentencing. At the postconviction hearing, he stated that he would have testified at the sentencing hearing but was never asked to do so by either of Hall's attorneys. Another overlooked witness, Patricia Rolfe Hunt, would have testified that Hall (who babysat for her occasionally) had literally saved the life of one of her children when the child began choking on some food.

Two other witnesses were also available who would have testified that Hall risked his own life to save theirs. Leta Powell had met Hall 15 years earlier when he jumped into the deep end of a pool to rescue her from drowning. It appears Hall gave her name to defense

counsel, but they did not contact her. Moreover, Powell testified at the post-conviction hearing that she called both Skelton and Ahlemeyer to offer to testify at Hall's sentencing hearing but that neither attorney ever returned her calls. Another woman whose testimony might have provided assistance to Hall was Paula Robinson. She would have testified that she had been accosted outside [*12] her home by a man wielding a knife and demanding money and that Hall had interrupted the robbery and chased the man away. Because neither Ahlemeyer nor Skelton ever spoke with Hall during the six weeks between his conviction and the capital sentencing hearing, they did not learn of Robinson's availability nor of the availability of other possible mitigation witnesses. Nor did they do any independent investigation on their own that might have led them to these or other witnesses. Thus, none of these witnesses testified at Hall's sentencing hearing.

Instead, at Hall's sentencing hearing the court heard only the testimony of two witnesses to counter the aggravating evidence presented by the State: Lloyd Shaddle, a part-time minister for the Jehovah's Witnesses who testified that Hall had attended religious services for a year prior to King's murder, and Hall himself. Although a third witness testified—Dr. Syed Ali, a psychiatrist at Pontiac Correctional Center—even the State does not contend that Dr. Ali provided mitigating testimony. In his closing argument to the court, Ahlemeyer made no effort to focus on even the meager mitigation evidence that the court had heard. Instead, he [*13] invited the judge to disregard the law of Illinois entirely, or, as he put it, "to focus in on an argument based [ ] just generally on the theory opposing the death penalty in all cases."

For example, he began by saying "the question now remains for you to decide today is [sic] whether you or God determines when and how [Hall] dies. That, Your Honor, is the problem with the death penalty. The death penalty makes some human beings, whether it be a member of a jury or a judge, as in this case, play God." The remainder of the argument was the same, drifting at times into subjects like the Karen Ann Quinlan case (dealing with the right to terminate life sustaining measures), chemical warfare, abortion, the arbitrariness of the death penalty as administered in the United States, the incompatibility of the death penalty with "every Canon of Judeo Christian Ethics," the inappropriateness of vengeance, Pope John Paul II's act of forgiving the man who attempted to assassinate him, and the finality of the sanction. The entirety of his remarks relating to Hall in particular were as follows:

The mitigating factors present in this case involve Mr. Hall's childhood development, lack of [*14] normal guidance and advantages that many of us have, his present abilities, his religious beliefs.

He then immediately said, "Your Honor, I am not asking you to spare Mr. Hall's life today solely for Mr. Hall's benefit. I am asking you to spare Mr. Hall's life today for all of our benefits, to demonstrate that we are not on the level of the perpetrators of vicious crimes . . . ." He concluded by saying, "I do not mean for one moment to excuse what the killer did to Frieda King. I mean rather to point out that it is important for us to retain our human qualities even though there are those among us who fall below that level."

The prosecutor, in contrast, focused on Hall himself throughout his argument. He rightly reminded the judge that the State of Illinois includes the death penalty in its statutes and considers it appropriate in some cases. He reviewed the statutory mitigating factors outlined in § 9-1(c) of the state's death penalty statute and argued that Hall had not proven the existence of any of them. At the conclusion of the arguments, the judge began by making specific findings about the statutory aggravating and mitigating factors. He commented that "the court finds [*15] that the mitigating factors here are very hard to find." With respect to nonstatutory mitigating factors, he discounted Dr. Shaddle's testimony on the ground that Hall's participation in Shaddle's Bible class occurred before he killed King, and he concluded that this sequence indicated the unlikelihood of Hall's future rehabilitation. Faced with "all the aggravating factors . . . stacked against the Defendant," and "a complete absence of mitigating factors," the court pronounced a sentence of death.

As noted above, the Illinois Supreme Court affirmed both the conviction and the capital sentence on direct appeal. Hall's petition for post-conviction relief went as a matter of course before Judge Caisley, the trial judge. In his order denying relief, Judge Caisley again reviewed the mitigating evidence that had been presented at the sentencing hearing. This time, he discussed in slightly more detail Hall's own account of his life, but the description fit the court's earlier assessment that there was "a complete absence of mitigating factors":

The defendant offered testimony in mitigation of his offense. He testified that he was born when his mother was only 13 years old. He lived [*16] with his mother

and his maternal grandparents until he was age 16, when he was first incarcerated. He had been out of prison only two years since his initial incarceration at age 16. He was 24 years old on February 8, 1983 and was 25 years old at the time of the sentence hearing. While in prison, he completed the necessary work to obtain his high school diploma by taking classes at Menard Correctional Center and he became a member of the Jehovah's Witnesses faith. After the defendant was transferred to the Pontiac Correctional Center, he was married. Lloyd Shaddle, a Jehovah's Witnesses minister who conducted religious services at the Pontiac Correctional Center testified that Hall attended services and regularly attended bible study classes and that he often expressed concern for his family.

The court noted that none of Hall's new evidence would have tended to prove the existence of any of the statutory mitigating factors of § 9-1(c). 720 ILCS 5/9-1(c). The rest of his additional evidence went only to Hall's character and personality, subjects about which the court asserted it was fully informed. It therefore concluded that there was no reasonable probability that the newly [*17] proffered evidence would have changed the outcome of the case. As noted earlier, the Illinois Supreme Court affirmed. See Hall II.

II

This Court has decided that the new provisions of 28 U.S.C. § 2254, which were added by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), apply to Hall's case, which was pending on the effective date of the Act. See Lindh v. Murphy, 96 F.3d 856 (7th Cir.

1996), cert. granted, 117 S. Ct. 726, 136 L. Ed. 2d 643, 1997 U.S. LEXIS 459, 1997 WL 8539. See also Hunter v. United States, 101 F.3d 1565 (11th Cir. 1996) (en banc), and Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996) (both of which agree with Lindh that the AEDPA applies to pending cases). But see Boria v. Keane, 90 F.3d 36, 38 (2d Cir. 1996); Edens v. Hannigan, 87 F.3d 1109, 1112 n.1 (10th Cir. 1996); Jeffries v. Wood, 103 F.3d 827, 1996 U.S. App. LEXIS 33220, 1996 WL 730493 (9th Cir. 1996) (en banc). As amended by the AEDPA, § 2254 authorizes the issuance of a writ of habeas corpus only if the challenged decision of the state court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United [*18] States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Under these new standards, our review of state courts' legal determinations continues to be de novo. So, too, does our review of mixed questions of law and fact, see Thompson v. Keohane, 133 L. Ed. 2d 383, 116 S. Ct. 457, 464-65 (1995); cf. Ornelas v. United States, 134 L. Ed. 2d 911, 116 S. Ct. 1657, 1661-62 (1996) (requiring de novo review of determinations of reasonable suspicion and probable cause for search warrants in federal cases). Under the AEDPA, however, we must answer the more subtle question of whether the state court "unreasonably" applied clearly established federal law as the Supreme Court has determined it. Pitsonbarger v. Gramley, 103 F.3d 1293, 1996 U.S. App. LEXIS 33211, Slip Op. at 3, 1996 WL 729040 at * 2 (7th Cir. 1996). The statutory "unreasonableness" standard allows the state court's con-

clusion to stand if it is one of several equally plausible outcomes. On the other hand, Congress would not have used the word "unreasonable" if it really meant that federal courts were to defer in all cases to the state court's decision. [*19] Some decisions will be at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue. Applying this standard, we hold that the state court's finding that Hall's counsel provided effective assistance at sentencing "involved an unreasonable application of clearly established Federal law" as determined by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Because the AEDPA imposes a higher burden on habeas petitioners than the prior law, it is clear that Hall would also have been entitled to relief even if it turns out that the AEDPA does not apply to pending cases. Thus, we need not await the Supreme Court's decision in Lindh in order to decide this aspect of the case.

III

Resolution of a claim of ineffective assistance of counsel at the penalty phase of a capital trial, like other claims of ineffective assistance, involves two elements: performance and prejudice. To prevail on the claim, petitioner must demonstrate both that counsel's representation fell below an objective standard of reasonableness and that a reasonable probability exists that, but for counsel's substandard [*20] performance, the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695; Brewer v. Aiken, 935 F.2d 850, 855 (7th Cir. 1991).

The performance standard envisions a wide range of permissible actions for the attorney in question, and it normally requires us to defer to an attorney's choice of strategy. See Strickland, 466 U.S. at 689; Emerson, 91 F.3d at 906. Nevertheless, where counsel's errors are such that she "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," Strickland, 466 U.S. at 687, her performance is deficient for these purposes. In the context of a capital sentencing hearing, it is particularly important that counsel not be allowed to shirk her responsibility. Thus, while we defer to legitimate, strategic decision-making, "from the perspective of strategic competence, we hold that defense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors." Kubat v. Thieret, 867 F.2d 351, 369 (7th [*21] Cir. 1989). Here, Hall's attorneys engaged in neither reasonable investigation nor logical argument. As in Kubat, Hall's representation at sentencing "amounted to no representation at all." Id. at 368.

Two distinct points are key to our conclusion: first, counsels' total failure to contact Hall in preparation for the sentencing hearing and their consequent failure to present his mitigation witnesses, and second, counsel's failure in his closing argument to offer any reason other than blatant disregard of Illinois law for sparing Hall's life. We take these in turn.

An attorney's decision not to present particular witnesses at the mitigation stage of a capital sentencing hearing does not necessarily brand his performance deficient. Such a decision can be strategically sound if it is

based on the attorney's determination that the testimony the witnesses would give might on balance harm rather than help the defendant. Emerson, 91 F.3d at 906 (citing Darden v. Wainwright, 477 U.S. 168, 186, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986)). Such a determination can rationally be made, however, only after some inquiry or investigation by defense counsel. Id. This does not mean that only a scorch-the-earth strategy [*22] will suffice, compare Stewart v. Gramley, 74 F.3d 132, 135 (7th Cir. 1996), but it does mean that the attorney must look into readily available sources of evidence. Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance. Stewart, 74 F.3d at 135. Similarly, where it appears from trial testimony that a witness might be willing to speak on behalf of one's client, or a defendant provides the names of possible mitigation witnesses, or individuals call to volunteer their testimony, counsel must at least take the time to contact those witnesses and determine for himself whether their testimony would be helpful. In the case before us, neither Ahlemeyer nor Skelton took even these simple steps, notwithstanding the impending capital sentencing hearing.

Ahlemeyer then compounded the problem with his closing argument. The death penalty may not constitutionally be applied without "consideration of the character and record of [*23] the individual offender and the circumstances of the particular offense." Woodson v. North Carolina, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976); Eddings v. Oklahoma, 455 U.S. 104,

110-12, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982). The Illinois death penalty statute properly requires the sentencer to consider all mitigating factors relevant to imposition of the death penalty. 720 ILCS 5/9-1(c). In order for the sentencer to do so, however, counsel must present an argument that focuses the sentencer's attention on those mitigating factors. Kubat, 867 F.2d at 369.

As with other strategic decisions, defense attorneys have some latitude in choosing how to approach a closing argument at a capital sentencing hearing. A simple plea for mercy may be a valid choice, if that plea focuses on the particular defendant and the circumstances of the particular offense. See Eddmonds v. Peters, 93 F.3d 1307, 1322 (7th Cir. 1996). Ahlemeyer's argument, as the description above shows, contained no such individualized appeal. Rather than asking the judge to decide against the death penalty for legally sufficient reasons—such as particular mitigating factors or the need for mercy in Hall's particular case—Ahlemeyer relied upon sweeping and [*24] largely irrelevant appeals to the judge's personal beliefs and religious principles. His only mention of Hall's particular history and character was pure boilerplate that could have been said of the majority of capital defendants. Nor did Ahlemeyer ever invite the court to find, as a matter of law, that the Illinois death penalty statute could not constitutionally be applied to Hall's case. (It would have been difficult to prevail on such an argument, even in 1984, see, e.g., People v. Jones, 94 Ill. 2d 275, 447 N.E.2d 161, 68 Ill. Dec. 903 (Ill. 1982), People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, 69 Ill. Dec. 136 (Ill. 1983), and cases cited in People v. Silagy, 101 Ill. 2d 147, 461 N.E.2d 415, 77 Ill. Dec. 792 (Ill. 1984), but this would at least have been a

recognizable legal position.) Ahlemeyer instead argued against using the death penalty because "vengeance is not ours to assert." In essence, Ahlemeyer was arguing for the judicial equivalent of jury nullification, asking the judge to ignore the valid law of Illinois and to decide against death on a wholly extralegal basis. Judge Caisley, told that he had a choice between disregarding his solemn oath to uphold the laws of Illinois and imposing the death penalty, quite understandably chose the latter course.

It [*25] was irresponsible and unacceptable for counsel, especially in the face of the numerous decisions of the Illinois Supreme Court upholding the Illinois death penalty statute (with which he never took issue), exclusively to adopt this line of argument. See also Del Vecchio v. Illinois Department of Corrections, 31 F.3d 1363 (7th Cir. 1994) (en banc). Claims that the Bible or a particular religion opposes the death penalty "have no bearing on the question whether a particular defendant who has been found guilty of capital murder should receive death or some lesser authorized penalty." Stokes v. Armontrout, 851 F.2d 1085, 1096 (8th Cir. 1988). See also Lewis v. Lane, 656 F. Supp. 181, 193-94 (C.D. Ill.), aff'd on other grounds, 832 F.2d 1446 (7th Cir. 1987) (ineffective assistance found where closing argument, instead of individualizing defendant, focused on abstract religious and philosophic appeal). Given its total lack of focus on Hall's individual character and record and its reliance on irrelevant religious claims, Ahlemeyer's argument to the court cannot be considered a reasonable strategic choice under Strickland.

Recognizing how poor counsels' performance was, [*26] there is a hint in this record of the argument that Hall

waived the right to effective assistance of counsel through his own misconduct, although the State never raises this point in its brief. A defendant's own conduct may serve to waive his right to appointed counsel. United States v. Harris, 2 F.3d 1452, 1455 (7th Cir. 1993). In Harris, the court found waiver where a defendant remained uncooperative, after he had refused to cooperate with three different attorneys and had been warned that he would be required to proceed pro se if he did not cooperate with the fourth. See also United States v. Fazzini, 871 F.2d 635, 642 (7th Cir. 1989). A defendant whose misconduct results in the loss of counsel may be required to represent himself, usually with an appointee as "shadow counsel." See Harris, 2 F.3d at 1455. Waiver of effective assistance of counsel in situations where counsel has not been excused may even be possible if the defendant's refusal to cooperate caused counsel's deficient performance. See Kleba v. McGinnis, 796 F.2d 947, 957 (7th Cir. 1986) (counsel's failure to determine witness's whereabouts excused where defendant failed to make counsel aware of the potential [*27] witness). But see Emerson, 91 F.3d at 906-07 (failure to present mitigating witnesses at sentencing phase of Illinois death penalty case was ineffective assistance of counsel even where defendant told counsel not to present any evidence and declined to make any statement himself).

Here, neither the record nor the state judge's own findings support a finding of waiver. The record is devoid of any evidence that Hall continued to be violent or uncooperative once the trial was underway, much less that his earlier misbehavior continued at the sentencing phase. The trial court noted for the record at the close of the

guilt/innocence phase that Hall had "passed notes, as well as making oral suggestions" to his attorneys during the defense of his case. In his post-conviction order, the court commented on how pleasant Hall could be at times. Most importantly, the trial judge, when presented with a motion by counsel to withdraw after Hall's assault, made a considered decision that they could represent Hall adequately and denied the motion. Courts are to grant substitution motions only when "counsel and defendant are so at odds as to prevent presentation of an adequate defense." United [*28] States v. Walker, 9 F.3d 1245, 1251 (7th Cir. 1994). Where, as here, a motion to withdraw is denied, counsel are not free to ignore the court's finding because of their personal dislike for their client. While Hall was certainly not an ideal client, counsel were still required to provide constitutionally adequate representation until such time as the court excused them.

Even though the state courts had not found that Hall waived his right to effective assistance, the district court here believed that counsels' performance was a result of Hall's deliberate noncooperation. Hall v. Washington, 916 F. Supp. 1411, 1439 (C.D. Ill. 1996). Looking only at the sentencing phase, however, it is hard to see how Hall's behavior affected counsels' performance in any way when they never made even the first move to contact him. The examples of uncooperativeness cited by the district court all occurred before the trial began. We do not find waivers even of the right to counsel lightly. United States v. Morrison, 946 F.2d 484, 502 n.4 (7th Cir. 1991) (referring to Faretta v. California, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975)); Love v. Young, 781 F.2d 1307, 1316 (7th Cir. 1986). Waiver of

competent [*29] representation, to the extent this is possible, would have to be supported by equally clear evidence before it could excuse substandard performance. Given the state judge's own finding about Hall's cooperativeness after the initial outbursts and his decision to require counsel to continue in the case, we conclude that Hall's own conduct did not excuse counsels' neglect of the case.

Having determined that Ahlemeyer and Skelton's performance fell below the standard set by Strickland we must inquire also whether that deficiency resulted in prejudice to Hall, for substandard performance alone does not violate the Sixth Amendment right to effective assistance of counsel. Only where a reasonable probability exists that, but for counsel's substandard performance, the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" will a violation of the Sixth Amendment be shown. Strickland, 466 U.S. at 695.

Counsels' failure to investigate and proffer available mitigation testimony, coupled with Ahlemeyer's choice of closing argument, meant that the trial court had a significantly different view of the balance between aggravating [*30] and mitigating circumstances when it made its initial decision. The trial court specifically stated that it had found a "complete absence of mitigating factors" and as a result, sentenced Hall to death. Without a reasonable showing of mitigation by the defense, the court had no choice: under the Illinois death penalty scheme, if no sufficient mitigating factors are found, "the court shall sentence the defendant to death." 720 ILCS 5/9-1(h) (emphasis added). See Eddmonds, 93 F.3d at

1320; Williams v. Chrans, 945 F.2d 926, 935 (7th Cir. 1991).

As the summary above indicates, the overall picture of Hall looks quite different when his additional mitigating evidence is added to it. He wanted to present concrete instances of good behavior from his past, as well as testimonials from people who knew him in the prison. Investigation would have brought forward testimony that Hall, although he had taken the life of Frieda King, had also risked his own life to save at least one and perhaps two other women. Significantly, the incident in which he rescued Robinson from a robbery-in-progress occurred after his first time in prison. Hall even had a corrections department employee, Thomas O'Connor, [*31] who worked closely with him and who was willing to testify. We have noted that information from prison guards may be particularly helpful in deciding clemency petitions "as it is the guards who have daily contact with [the inmate] and therefore can realistically assess his person." Shimer v. Washington, 100 F.3d 506, 508 (7th Cir. 1996). The trial court might have been impressed by the fact that a corrections employee was willing to speak up for the killer of another corrections employee.

In our view, there is a "reasonable probability" that the evidence Hall's lawyers never found might have resulted in a no-death finding by the court had it been presented at the proper time. We realize that the trial court, acting seven years later on the post-conviction petition, stated that Hall's additional evidence would not have changed his mind. This cannot, however, be conclusive; it must be subject to the "unreasonableness" review required by either 28 U.S.C. § 2254(d)(1) (if we characterize it as a mixed question of law and fact) or § 2254(d)(2) (if it is

better viewed as a pure question of fact). In the absence of some review, trial courts would be able to disregard even the most [*32] powerful evidence with impunity. Either way, the reason why the judge believed the new evidence had no impact on his thinking is important. Both the trial judge and the Illinois Supreme Court thought that the newly proffered mitigation evidence was "mere" character evidence that was cumulative to evidence admitted at the sentencing hearing. Hall II, 626 N.E.2d at 137. In its initial decision, however, the trial court had found that absolutely no mitigating factors—statutory or nonstatutory—were present. It made no mention of Hall's pleasant character, his willingness to perform good deeds (even at serious physical risk to himself), or his general demeanor around the prison. If no mitigating evidence was before the court during the initial hearing, it is logically impossible for the new evidence to be "cumulative" to something in the earlier record.

Furthermore, the trial judge's conclusion on post-conviction review was predicated on the assumption that the judge himself would have been the decisionmaker at sentencing if counsel had been competent. As our earlier discussion demonstrates, however, the record shows that Hall's waiver of a sentencing jury resulted from Ahlemeyer's [*33] and Skelton's failure properly to advise him about capital sentencing in the first place. To make matters worse, what they did tell him about jury determinations may well have misinformed him about the choice he faced when choosing between jury sentencing and bench sentencing.

Prior to the start of trial, Skelton told Hall that the difference between a jury trial and a bench trial was that

"unanimity would be necessary and required in a jury setting," while if a judge were to try the case "it would be his decision alone." Neither attorney, either prior to trial or following Hall's conviction, told Hall that a different rule applies to a capital sentencing jury or explained Illinois' "one-juror" rule. Neither attorney spoke with Hall during the hour-long recess called by the court for the very purpose of allowing them to advise him about waiving a capital sentencing jury. When the court called an additional recess to allow them to provide this advice, Skelton spoke with Hall for only 40 seconds and told him only that he had the right to have a "jury determination" or "a judge's determination" at the penalty phase. Although Ahlemeyer was also present, he gave Hall no information at [*34] all about the waiver decision. As Illinois Supreme Court Justice Simon pointed out:

> the nature of the decision by a capital sentencing jury differs from that of an ordinary trial jury, with which the defendant had some previous experience, on the very point at issue here: the consequence of a single juror dissenting. . . . Far from providing any meaningful basis for the decision whether to waive the jury for sentencing, the defendant's prior experience with the jury system may actually have misled him on the consequences of unanimity." Hall I, 499 N.E.2d at 1355 (Simon, J., dissenting).

Hall's attorney's explanation that "unanimity would be necessary and required in a jury setting" only made matters worse, insofar as it was unaccompanied by any suggestion that the system worked in exactly the opposite way at the sentencing stage.

Hall himself alerted the court to this problem before the sentencing hearing began (and thus before he

learned whether the judge would be lenient or not), as soon as he learned how the system operated. The court, however, refused his request to revoke his waiver on the curious ground that it had discharged the earlier jury (which had never been [*35] used at the guilt phase). Because this indicates that the decisionmaker itself would have been different had counsel performed adequately, we conclude that the prejudice required by Strickland has also been shown here.

We accordingly hold that Hall received ineffective assistance of counsel at his capital sentencing hearing and that he must be granted a new sentencing hearing. This conclusion makes it unnecessary for us to consider his alternative arguments that focus exclusively on the sentencing proceeding. Hall also makes two arguments that affect his conviction: first, that he was deprived of an impartial adjudicator when the trial judge refused to recuse himself after Hall's assault, and second, that he was deprived of effective assistance of counsel at the trial when the judge forced his lawyers to continue representing him after they notified the court that the attorney/client relationship was "irretrievably lost." With respect to the need for the trial judge to recuse himself, we agree with the district court that there was no evidence of actual bias on the part of the judge, and thus no ground for relief on that theory under our decisions in Del Vecchio v. Illinois [*36] Department of Corrections, supra, and Wilks v. Israel, 627 F.2d 32 (7th Cir. 1980). With respect to the judge's refusal to permit counsel to withdraw from the case before the trial, for the reasons noted above we disagree that Hall's misbehavior would furnish an excuse for constitutionally ineffective performance. Nevertheless, our review of the trial record leads

us to agree with both the district court and the Illinois Supreme Court in Hall I that counsels' performance before and during the trial was competent.

The judgment of the district court is therefore REVERSED in part and the case is REMANDED for the issuance of a writ of habeas corpus requiring a new sentencing hearing for petitioner Anthony Hall.

ANTHONY HALL, Petitioner-Appellant, v.
ODIE WASHINGTON, Director, Respondent-Appellee.

No. 96-1704

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1997 U.S. App. LEXIS 4735

March 10, 1997, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Central District of Illinois. No. 95-1125. Joe Billy McDade, Judge.

Original Opinion of February 4, 1997, Reported at: 1997 U.S. App. LEXIS 1833.

DISPOSITION: DENIED.

COUNSEL: ANTHONY HALL, Petitioner-Appellant: Richard E. Cunningham, Chicago, IL USA. Anne E. Carlson, Chicago, IL USA.

For ODIE WASHINGTON, Director of the Illinois Department of Corrections, Respondent-Appellee: Arleen C. Anderson, Bradley P. Halloran, OFFICE OF THE ATTORNEY GENERAL, Chicago, IL USA. Penelope Moutoussamy George, OFFICE OF THE ATTORNEY GENERAL, Criminal Appeals Division, Chicago, IL USA.

JUDGES: Before Hon. WALTER J. CUMMINGS, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge

OPINION: ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc, filed February 18, 1997 by counsel for the respondent-appellee, all judges on the original panel have voted to deny rehearing, and no judge in regular active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED. [*2]

APPENDIX B

UNITED STATES OF AMERICA ex rel.
ANTHONY HALL, Petitioner, v.
ODIE WASHINGTON, Director of the Illinois Department of Corrections, Respondent.

Case No. 95-1125

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS,
PEORIA DIVISION

916 F. Supp. 1411; 1996 U.S. Dist. LEXIS 1984

February 22, 1996, Decided
February 22, 1996, FILED

COUNSEL: [**1] For Petitioner: MARC R. KADISH, IIT CHICAGO-KENT LAW SCHOOL, Chicago, IL. RICHARD CUNNINGHAM, Chicago, IL.

For Respondent: BRADLEY P. HALLORAN, ARLEEN C. ANDERSON, OFFICE OF THE ATTORNEY GENERAL, State of Illinois, Chicago, IL.

JUDGES: JOE BILLY McDADE, United States District Judge

OPINION BY: JOE BILLY McDADE

OPINION: [*1416] ORDER

Before the Court is Petitioner Anthony Hall's Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 By a Person in State Custody Under a Sentence of Capital Punishment [Doc. # 6].

BACKGROUND

Procedural History

On April 17, 1984, following a bench trial in the Circuit Court of McLean County, Illinois, Anthony Hall was found guilty of murder. After the court determined that he had waived his right to a jury sentencing, the court sentenced him to death. Hall filed a direct appeal to the Illinois Supreme Court which affirmed his conviction and sentence on October 17, 1986, People v. Hall, 114 Ill. 2d 376, 499 N.E.2d 1335, 102 Ill. Dec. 322 (1986) ("Hall I"), and denied his petition for rehearing on December 1, 1986. The United States Supreme Court denied Hall's petition for writ of certiorari on March 30, 1987, Hall v. [**2] Illinois, 480 U.S. 951, 94 L. Ed. 2d 802, 107 S. Ct. 1618 (1987), and his petition for rehearing on May 18, 1987. Hall v. Illinois, 481 U.S. 1060, 95 L. Ed. 2d 860, 107 S. Ct. 2205 (1987).

Hall subsequently filed a state post-conviction petition in the Circuit Court of McLean County on September 28, 1987. On March 6, 1991, the trial court denied the petition. On September 23, 1994, the Illinois Supreme Court affirmed the denial of post-conviction relief. People v. Hall, 157 Ill. 2d 324, 626 N.E.2d 131, 193 Ill. Dec. 98 (1993) ("Hall II"). The petition for rehearing was denied on January 31, 1994. On November 14, 1994, the United States Supreme Court denied Hall's petition for writ of certiorari. Hall v. Illinois, 130 L. Ed. 2d 415, 115 S. Ct. 507 (1994).

On March 7, 1995, the Illinois Supreme Court stayed Hall's execution pending the filing of his petition for habeas corpus in federal court. Hall filed a § 2254 Petition in this Court on March 23, 1995. By leave of this

Court, an Amended § 2254 Petition was filed on July 11, 1995, which asserts the following claims:

I. MR. HALL WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS [**3] WHEN THE TRIAL COURT PRONOUNCED A DEATH SENTENCE, ERRONEOUSLY HOLDING THAT ILLINOIS LAW PREVENTED [*1417] IT FROM BEING MERCIFUL AND FROM FOLLOWING ITS INDIVIDUAL CHOICE TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT

II. TRIAL COUNSEL WERE CONSTITUTIONALLY INEFFECTIVE AT THE CAPITAL SENTENCING HEARING WHERE THEY FAILED TO INVESTIGATE AND PRESENT ANY OF TEN SIGNIFICANT AND AVAILABLE MITIGATION WITNESSES AND WHERE THEY FAILED TO HIRE A MITIGATION EXPERT AND FAILED TO ASSIST IN THE PREPARATION OF THE PRESENTENCE REPORT

III. MR. HALL'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHERE HE DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO A SENTENCING JURY BECAUSE NEITHER THE COURT NOR COUNSEL INFORMED HIM THAT A JURY'S DECISION TO IMPOSE THE DEATH PENALTY MUST BE UNANIMOUS OR ELSE NO DEATH PENALTY MAY BE IMPOSED

IV. THE TRIAL JUDGE'S REFUSAL TO RECUSE HIMSELF AFTER HE HAD BEEN PHYSICALLY ASSAULTED BY THE DEFENDANT VIOLATED THE RIGHT TO A TRIAL AND SENTENCING HEARING BEFORE AN IMPARTIAL ADJUDICATOR AS GUARANTEED BY

THE FOURTEENTH AMENDMENT AND BY THE EIGHTH AMENDMENT

V. THE TRIAL JUDGE'S REFUSAL TO ALLOW DEFENSE COUNSEL TO WITHDRAW AFTER THEY HAD A SERIES [**4] OF DISPUTES WITH MR. HALL CULMINATING IN MR. HALL'S PHYSICAL ATTACK ON COUNSEL AND AFTER COUNSEL'S ASSERTION THAT THE ATTORNEY/CLIENT RELATIONSHIP WAS "IRRETRIEVABLY LOST" VIOLATED MR. HALL'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

VI. MR. HALL WAS DENIED A FULL AND FAIR HEARING TO ESTABLISH HIS CONSTITUTIONAL CLAIMS WHERE THE POST-CONVICTION COURT REFUSED TO ALLOW HIGHLY RELEVANT EVIDENCE AND WHERE IT REFUSED TO RECUSE ITSELF IN THE FACE OF THE APPEARANCE OF PARTIALITY

A. The Refusal To Allow An Expert In the Defense of Capital Cases To Testify and Give His Opinion That Trial Counsel Rendered Prejudicially Ineffective Assistance of Counsel

B. The Refusal To Appoint A Mitigation Expert To Establish Prejudice In Sentencing Counsel's Ineffective Performance

C. The Trial Judge's Failure To Recuse Himself From The Post-Conviction Proceedings

VII. THE ILLINOIS DEATH PENALTY STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

A. The Illinois Death Penalty Statute is unconstitutional on its face because it fails to guard against discriminatory, arbitrary and capricious exercise of prosecutorial discretion [**5] in determining which defendants shall be subjected to a death penalty hearing.

B. The Illinois Death Penalty Statute is unconstitutional because it is applied in an arbitrary, capricious and discriminatory manner.

C. The Illinois Death Penalty Statute unconstitutionally vests a judicial function in the prosecution.

[*1418] D. The Illinois Death Penalty Statute is unconstitutional on its face because it fails to limit the nonstatutory aggravating factors which may be considered by the sentencing authority.

E. The Illinois Death Penalty Statute is unconstitutional on its face because it fails to require written findings with regard to nonstatutory aggravating factors that would allow meaningful review and ensure that improper factors were not considered at sentencing.

F. The Illinois Death Penalty Statute is unconstitutional because it shifts to the defendant the burden of proving that a sentence other than death is appropriate or at least it is unclear who bears the burden of proof.

G. The Illinois Death Penalty Statute unconstitutionally fails to require a determination that death is the appropriate penalty.

H. The Illinois Death Penalty Statute unconstitutionally [**6] fails to provide adequate notice that the State will seek the death penalty.

I. The determination by a majority of the Illinois Supreme Court that the Death Penalty Statute is unconsti-

tutional renders the statute and Mr. Hall's execution unconstitutional.

J. The cumulative effect of its defects renders the Illinois Death Penalty Statute unconstitutional.

Factual Background[1]

On February 8, 1983, the body of Frieda King was found in a small closet next to a large walk-in freezer in the Pontiac Correctional Center. An autopsy revealed that King had died from severe blood loss resulting from stab wounds in the upper portion of her back and chest. At the time of the murder, Petitioner Hall had been working as a clerk [**7] in the inmate kitchen. After an investigation, Hall was charged with the murder on February 14, 1983.

Mr. Hall's case was assigned to Judge William T. Caisley. The case remained on Judge Caisley's call throughout trial and post-conviction proceedings. On March 8, 1983, the court appointed Livingston County Public Defender David Ahlemeyer as Hall's counsel. Soon after, Hall sent a letter to Judge Caisley complaining that he was unable to establish a rapport with Ahlemeyer, apparently out of fear that the public defender's ties to the community and political concerns would weaken his ability to represent Hall. In a second letter to Judge Caisley dated June 20, 1983, Hall continued to express dissatis-

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[1] The Court presumes the factual findings of the state court to be correct and will only supplement them with facts from the record which are not inconsistent with those findings. Purkett v. Elem, 131 L. Ed. 2d 834, 115 S. Ct. 1769, 1771 (1995); 28 U.S.C. § 2254(d).

faction with Ahlemeyer and asked to be represented by private counsel. Hall wrote that a "conflict of interest [between himself and Ahlemeyer is] an understatement" of the situation.

On July 11, 1983, Ahlemeyer filed a motion for a fitness hearing on the ground that "defendant refuses to cooperate with counsel and refuses to visit with him at the Pontiac Correctional Center." On August 17, 1983, the court held a hearing to consider Hall's motion to discharge Ahlemeyer and Ahlemeyer's [**8] motion to withdraw as Hall's counsel. Ahlemeyer informed the court that Hall had refused to meet with him at the Pontiac Correctional Center on June 29, 1983. Ahlemeyer further alleged that the correspondence with Hall thereafter indicated that Hall would not cooperate with him. Ahlemeyer therefore requested leave to withdraw on the ground that it was impossible to prepare an adequate defense without the cooperation of Hall. He did assure the court, however, that he had no animosity toward Hall and that there was no conflict of interest which would affect his representation.

In requesting the appointment of other counsel, Hall informed the court that he was dissatisfied because Ahlemeyer had never provided him with discovery material despite his requests and because Ahlemeyer was often not available to take Hall's phone calls or to keep Hall fully informed as to the status of [*1419] the case. Hall also claimed that he had lost confidence in Ahlemeyer's ability to vigorously contest guilt because Ahlemeyer had advised him to take a bench trial to avoid the death penalty. Finally, Hall requested counsel more experienced in capital litigation since Ahlemeyer had never been involved in a capital [**9] case before.

After hearing the State's argument in opposition to the appointment of other counsel, the court stated:

> I do find that the evidence produced here before this court today, the representation of the public defender and the representation of the defendant, show that there has been inadequate preparation of this case for trial at the present time; that is in part due to the fact that the public defender had other matters which he was attending to earlier in this year and was unable to confer with Mr. Hall and that he may have been absent from his office on several occasions when Mr. Hall attempted to call him and to that extent the failure to be ready for trial may be attributable to the public defender. I do also find that Mr. Hall has refused to consult with his counsel since June and that the Public defender has on [at least one occasion] been out to the penitentiary . . . and Mr. Hall has refused to consult with him relevant to his defense . . . and so I do find that a portion of the failure to be ready for trial on the defense's part rests with the defendant in failing to accept a visit from the Public Defender on one and possibly two occasions, and it is obvious [**10] to the court from what has transpired here in open court today that there does appear to be a lack of a good working relationship between the defendant and his counsel.

The court ruled that, while it "is apparent that [Hall and counsel] are not getting along well together . . . that there is some bickering going on here, [this does not] constitute cause for the appointment of counsel other than the Public Defender." The court also found that counsel's lack of experience in capital litigation did not call for the appointment of other counsel. The court reasoned that an indigent defendant is entitled only to representation by the Public Defender and not by counsel

of his choice. Ahlemeyer then asked that the court disregard any pro se motions the defendant filed. The court thereafter granted Ahlemeyer's motion for a fitness hearing.

The fitness hearing was held on October 4, 1983. Ahlemeyer offered into evidence the report of Dr. Robert Chapman who concluded that Hall was psychologically fit to stand trial. Ahlemeyer requested to testify, and he was examined by the court. He testified that Hall continually refused to meet with Ahlemeyer or to assist Ahlemeyer on the case. As [**11] a result, Ahlemeyer was of the opinion that it was impossible to prepare an adequate defense. However, Hall testified that his refusal to cooperate with Ahlemeyer was a "deliberate and rational act" based upon Ahlemeyer's collusion with the State. He then told the court: "I am not going to cooperate with him and if he comes within an arm's length of me I will spare you the particulars. If that is what I have to do to get him off this case, I will rise to that occasion. I can only get an assault charge." Hall further stated that he would not cooperate with any local counsel, explaining that he had written to "private practice attorneys in the Bloomington area and they are so unethical they won't answer my letters." The court ruled that Hall was fit for trial and continued the matter until November 1, 1983.

On November 1, 1983, Ahlemeyer requested that Hall be shackled while he was in the courtroom. The court, after reading a letter addressed to the court in which Hall substantially repeated the threat made earlier, ordered Hall shackled. The court then indicated that it would entertain Hall's renewed motion for other counsel. Hall indicated he did not want to deal with Ahlemeyer or

[**12] any other local counsel. He also informed the court that a private attorney, Shelly Bannister, had corresponded with him and agreed to represent him if the court would order her appointment. A letter from Bannister to the court, which was made part of the record, indicated that she had extensive background in criminal cases arising from the penitentiary, that she had discussed the case with Hall and was able to cooperate with him, and that [*1420] she was willing to accept appointment as Hall's counsel.

Ahlemeyer also renewed his motion to withdraw as counsel. Ahlemeyer argued that the physical threat Hall made in open court was a changed circumstance which required Ahlemeyer's withdrawal. He said that the threat gave "rise to a conflict between the defendant and myself that would make it very difficult for me to represent him." Ahlemeyer said that even if the defendant were rendered "absolutely immobile," the threat still "would create a conflict in my own mind." Ahlemeyer also stated: "I personally feel that his threats both in the courtroom and by letter to me were simply a part of his . . . tactics of putting the court in the position not knowing what to do as far as restraining the Public [**13] Defender." Ahlemeyer said he regretted the need for the shackling. The following then occurred:

> Mr. Ahlemeyer: I personally think, your Honor, his being shackled while I prepare the case with him would not—why should I get away from you, are you threatening me again?
>
> Defendant: No, I am not threatening you.
>
> Mr. Ahlemeyer: What did you say, say it louder so the court reporter can get it on the record.
>
> Defendant: That was off the record.

Mr. Ahlemeyer: He said "get away from me."

Defendant: Yes, Get away from me. I am afraid of you. Keep him away from me.

The Court: Please have a seat.

Defendant: I am afraid of that man, keep him away from me.

The Court: Mr. Hall, have a seat.

Defendant: You understand?

The Court: I understand.

Defendant: Keep him away from me, I am afraid of him.

The Court: Just please take a seat.

Mr. Ahlemeyer: I would simply state your Honor, I don't think the shackling would inhibit any preparation for trial . . . I would agree with Mr. Hall that being shackled in the courtroom is not the best procedure and may be something that would have to be overcome, but unfortunately I don't think [**14] that he has left us with any choice in the matter.

The court denied the motions to replace Ahlemeyer as counsel and to appoint Shelly Bannister as Hall's counsel. The court then announced that it would meet in chambers off the record separately first with Hall and then with Ahlemeyer. After these conferences, the court indicated that it had discussed the possibility of appointing the Public Defender of McLean County to assist Ahlemeyer in the defense. While Hall initially refused this offer, on December 5, 1983, he acquiesced to the court's appointment of Steven Skelton, the Public Defender of McLean County.

The selection of the jury for Hall's trial commenced on February 21, 1984. Just prior to jury selection, the court

ordered that Hall be and remain unshackled for the trial. The proceedings continued through the selection of the jury. At that point, Hall made a motion to the court saying there were certain witnesses he wanted to testify but that his counsel refused to call them. Defense counsel stated that these witnesses would harm the defense, and if they were called, Hall would have to represent himself. Hall thereby made a motion to conduct the trial pro se. The court urged [**15] Hall to consider the matter overnight and stayed the proceedings until the next day.

The following day, after Hall's continued insistence that he be allowed to proceed pro se, the court adjourned the proceedings to the conference room so that it could talk privately with defense counsel and Hall. During this conversation, the court advised Hall that it would be "foolhardy" to conduct the trial pro se. Hall in response asked the court if he could proceed pro se but have counsel sit with him, advise him, and pose objections for him. Ahlemeyer objected "strenuously" to this arrangement, calling it half-way representation and a violation of "every ethical code." The court asked Hall who the witnesses were that he wished to call, but before Hall could answer, Ahlemeyer objected because he believed it possible that a jury trial might still be waived and that Judge Caisley could then be the trier of [*1421] fact. Judge Caisley then suggested that he (Judge Caisley) leave the room and that Hall's objections be placed on the record in his absence.

There followed an interruption in the record, after which the court stated:

> Let the record show that the defendant has now been removed and that [**16] the prosecution is now

> present in chambers and that we are outside the presence of the jury and the persons assembled in the courtroom, and let the record further show that defense counsel, Steven Skelton has just been struck on the head with a chair and that the court has also been struck by defendant on the head with his fist and at this point, bearing in mind the previous threats that were made by the defendant at the pretrial stage against defense counsel, the court is going to order from this stage on the defendant shall be shackled at all times whether in the presence of the jury or not because it is essential for the security of the court and the officers of the court. This decision has been made only with most reluctance, but I think that with this overt act and the fact that one defense counsel and the court itself has been attacked by this defendant indicates the necessity of this step which is most reluctantly taken.

Ahlemeyer and Skelton subsequently testified that, not only had Hall struck Skelton over the head with a chair, but he had also thrown a chair at Ahlemeyer before punching Judge Caisley. Skelton's injuries included "a pretty good lump and a welt, a concussion." [**17] His jacket was ripped down the back. Skelton had headaches continuously for two weeks thereafter, causing him to consult his physician. Ahlemeyer slightly injured his leg as he tripped over the court reporter's machine on the way out the door. Ahlemeyer and Skelton testified that Judge Caisley was the "most severely hurt" of the three. Medical personnel at the courthouse told him to lie down, and he did so for about a half hour. He had abrasions and contusions on his head. Judge Caisley disagreed with defense counsel's assessment as follows: "I was struck in the head, and I did suffer a contusion, swollen slightly in the head, and I was not significantly injured."

After the attack, Hall was removed from the conference room by several correctional officers and was ordered to be shackled by the court. After this was done, Hall was brought back into the court outside the presence of the jury. The court then asked Hall if he still wished to proceed without counsel. When Hall did not respond, the court assumed that his silence constituted a withdrawal of his motion.

Defense counsel then made another motion to withdraw from the case, stating that they could not "ethically or morally" proceed [**18] on Hall's behalf and that any attorney-client relationship which had previously existed was now "irretrievably lost." They also pointed out that the occasion may arise when they might be called to testify against Hall in a separate proceeding arising from the battery. However, the court denied the motion saying that "under the circumstances, just minutes before the trial is to begin I don't think at this point I can in all fairness allow defense counsel to withdraw." Defense counsel also asked the court to reconsider its decision that Hall's silence constituted a withdrawal of his motion to proceed pro se. Counsel pointed out that the last thing Hall had said was that he still wanted to represent himself and that the matter had never been adequately resolved. The court responded that Hall had never unequivocally stated that he did not want counsel and thus he had never knowingly waived his right to counsel.

Defense counsel next made a motion for a mistrial, arguing that the occurrence in the conference room had tainted the jury. The court denied the motion for a mistrial saying that a defendant could not, by his own misconduct, bring about a mistrial. Moreover, the court found that [**19] the conflict between Hall and his

counsel afforded no grounds for mistrial, nor did the possibility that the jury might have heard the scuffle in chambers.

Defense counsel further asked the court to recuse itself, arguing that it would be impossible for the court to be fair after being struck on the head by Hall. The court denied [*1422] the motion for recusal, saying that the interests of "proceeding to justice . . . requires a certain element of courage to go forward" and that it would not allow the fact that Hall had struck the court to prejudice or influence it.

The court allowed Hall back into the courtroom, but required that he sit away from his counsel, with several guards seated behind him, and with his hands and feet cuffed. Hall made another motion to waive his right to counsel and proceed pro se. The court questioned Hall and found that there was no knowing and intelligent waiver. Hall told the court, "I still don't understand a word you said," and accused Skelton of hitting him. The motion was denied.

During the prosecution's opening statement to the jury, Hall interrupted to inform the court that he wanted to waive his right to a jury trial. After the prosecution concluded [**20] its opening statement and defense counsel reserved an opening statement, the jury was excused and counsel repeated Hall's request to waive a trial by jury. The court admonished Hall as to the charges against him, and that the court would determine his guilt or innocence and the range of possible sentences if judgment were entered against him. Hall said that he understood, and the court accepted his jury waiver for the guilt phase of the trial.

At that point, there arose a question as to whether Hall was also waiving his right to a jury sentencing. Hall told the court, "I don't want a jury, period, in any phase of this trial." He explained:

> Assuming that we get to the penalty phase, and according to the conduct that happened today by you being hit in the mouth and the attorney being jumped on and the attorney be fighting with me, I feel that you would transfer, and correct if I am wrong, transfer the penalty disposition to another Court to decide, that way it would clear yourself of undue prejudice or bias due to the fact that you were hit in the mouth today and this is what I see may come down the line, assuming that I am found guilty. That is why I want to have that right [**21] exercised today to waive jury on the guilt and innocence phase and penalty, if possible, if we get to that stage.

However, Defense counsel, the State, and the court all agreed that the issue had not yet arisen and therefore the court postponed any decision as to whether Hall was also waiving jury sentencing.

The court informed the members of the jury that Hall had decided to waive trial by jury. The court therefore excused the jury but admonished the jurors to avoid speaking to anyone or listening to radio or television broadcasts concerning the case because there was "the possibility that you may be required to determine the matter of punishment." After the jury was excused, Hall was tried by the court which found Hall guilty of murder on March 2, 1984.

After the guilty verdict, the State reminded the court that it was seeking capital punishment and therefore asked that Hall make a choice whether to call back the

original jury, pick another jury, or proceed with a court sentencing. Defense counsel requested a date for sentencing and said it would make a decision prior to that. The court, however, said it needed a decision that afternoon because it had "14 jurors who have [**22] been qualified." The court was referring to the jurors who had been dismissed following the State's opening argument. The court recessed the proceedings until afternoon and again asked Hall to decide whether he wanted a court or jury sentencing. After a brief forty second recess in which Hall discussed the matter with his counsel, Hall told the court he would waive jury sentencing.

The court admonished Hall that if he waived jury sentencing, the court would be the sole determiner of the sentence. However, the court did not explain to Hall that under Illinois law, a jury's decision to impose the death penalty must be unanimous. The court accepted Hall's waiver, and the jury was discharged.

Later that same day, Hall spoke to Charles Schiedel, Deputy Defender of the Supreme Court Unit of the State Appellate Defender's Office, who asked Hall if he had been advised of the unanimity requirement for imposing a jury verdict. When he learned that Hall had not, Schiedel explained [*1423] the requirement to Hall and advised him to tell his attorneys and the court of the unintelligent nature of his jury waiver. On April 17, 1984, the day the sentencing hearing was to begin, Hall made a motion to withdraw [**23] his jury sentencing waiver on the basis that he had not been informed, either by the court or by counsel, that a jury's decision to impose the death penalty must be unanimous. The court denied Hall's motion to withdraw his jury waiver, saying that Hall had knowingly waived his right to a jury

sentencing and that a qualified jury had already been discharged.

The State proceeded with aggravation witnesses, first calling the warden of Pontiac prison, who testified that the deceased was killed while working in the prison. The State next introduced the testimony of Ron Umbdenstock, a correctional captain at Menard Correctional Center. He testified that Hall was involved in an altercation while an inmate at Menard. Hall had allegedly held an inmate while two other inmates stabbed him; however, the victim was only slightly injured. Umbdenstock also testified that Hall and his accomplices had tried to throw a man off the prison galley. Hall had ten months of statutory "good time" revoked because of this incident. On cross-examination, the witness admitted that the report written on the incident only charged Hall with being involved in a fist fight.

The State introduced convictions for armed [**24] robbery, armed violence, and rape. The State also introduced the testimony of two of Hall's past victims. One testified that she had been robbed and raped by Hall, and the other testified that Hall had robbed and attempted to rape her. The State offered no evidence concerning the assault on defense counsel and the trial judge.

The defense introduced the testimony of Lloyd Shaddle, a dentist and Jehovah's Witnesses minister who had conducted religious services for Hall while he was incarcerated. He testified that Hall regularly attended bible study classes and often expressed concern for his family.

Hall took the stand next. He testified that his mother had been 13 years old when he was born. He testified

that he had first been incarcerated at the age of 16 and had been out of prison for only two years of his entire adult life. He also testified that he was married, a high school graduate, and a member of the Jehovah's Witnesses. The final witness was Dr. Syed Ali, a psychiatrist at Pontiac Correctional Center. He conducted an examination of Hall from which he determined that Hall was of above-average intelligence and was anxious and depressed about the forthcoming sentence.

The [**25] court also considered a presentence report prepared by Probation Officer Ramona Beasley. The report consisted of a recitation of Hall's prior convictions and his institutional disciplinary record. The report indicated that the probation officer had sent a letter to Hall's wife, Clereatha Hall, but that she had not responded. The report also stated that the probation officer had attempted to interview Hall in prison on two occasions, but he had refused to speak to her.

In his final argument before sentencing, Ahlemeyer argued to the court that the death penalty is wrong in every case. He further contended that "the mitigating factors in this case involve Hall's childhood development, lack of normal guidance and advantages that many of us have, his present abilities, his religious beliefs." Ahlemeyer then concluded by asking the court "to spare Hall's life today for all of our benefits, to demonstrate that we are not on the level of the perpetrators of vicious crimes; that we are capable of rising above that and dealing with people in a human way and in a Christian way . . . when a tragedy like this happens, all of us bear some of the guilt."

In sentencing Hall to death, Judge Caisley [**26] set forth the various statutory factors that he had considered in making his decision. During this discussion, he added:

> I haven't seen that spark of interest in rehabilitation, that desire on the part of the defendant to change. Doctor Shaddle was in here this morning and spoke about teaching Bible class in which the defendant was enrolled and this might have set off an indication within the defendant that he was going to become rehabilitated. However, [*1424] this offense occurred after [Hall's attendance in Bible class] and so I am not persuaded that there is likely to be rehabilitation in this case.

The court concluded:

> The choice in this case really boils down to two choices and both of them certainly have a cry to be heard and considered by this court. It is a choice between justice and a choice between mercy. If the choice were mine to make individually I would make a choice on the side of being merciful in sentencing this Defendant to a term of life imprisonment. However—and I do feel just because Anthony Hall did not show mercy toward Frieda King and did not show mercy toward any of the other unfortunate victims, two of whom were here today, is not a good [**27] reason to deny him mercy. But I have also taken an oath to administer the laws of the State of Illinois in a manner that I best can, and it seems to me that it is my duty under the laws of the State of Illinois in following my oath of office as judge to sentence the Defendant, Anthony Hall, to death. And so it is with a good deal of personal reluctance on my part, although not with any doubt that he is guilty of this offense or that there are any mitigating factors under the statute that would prevent it or that there

> are any aggravating factors that would prevent it. I think all of the aggravating factors are stacked against the Defendant. I think there has been a complete absence of mitigating factors. I am persuaded there is not reasonable doubt here, and so it is my unhappy duty under the laws of the State of Illinois to sentence Anthony Hall to death . . .

After Hall's direct appeal was affirmed by the Illinois Supreme Court, he filed a pro se post-conviction petition alleging that he had been denied his right to the effective assistance of counsel at sentencing and that he had not made a knowing and intelligent waiver of the sentencing jury. Judge Caisley initially appointed [**28] the Public Defender of Logan County as Hall's post-conviction counsel, but when Hall requested that Professor Marc R. Kadish of Chicago be appointed, the judge granted the request. Kadish moved for Judge Caisley's recusal based upon the assault, but the motion was denied. The defense also filed a motion for the appointment of a mitigation expert to help establish sentencing counsel's ineffectiveness. The court denied the motion.

The court did, however, grant an evidentiary hearing on the ineffective assistance of counsel issue. The defense filed a motion in limine to be allowed to call Michael Metnick as a legal expert to testify as to the prevailing standard for counsel competency in capital cases and to render his opinion that sentencing counsel in this case failed to meet that standard. The court found that Metnick was qualified as an expert, but refused to allow him to testify on the ground that his testimony would not be helpful because he would be second-guessing trial tactics of original counsel.

At the evidentiary hearing, the defense presented testimony and affidavits of ten mitigation witnesses who were never contacted by defense counsel or asked to testify at the sentencing [**29] hearing. These witnesses were: Father Richard Means, a chaplain at Pontiac Correctional Center; Leta Powell, whom Hall had saved from drowning; Thomas R. O'Connor, who had worked with Hall at Pontiac; Paula Robinson, whom Hall had assisted by chasing away an attacker; Patricia Rolfe Hunt, whose child Hall had saved from choking; Fate Mickel, Hall's old basketball coach; Julian Smith, a janitor at Hall's elementary school; and Hall's mother, sister, and wife.[2]

Hall testified on his own behalf about his attempts to have Ahlemeyer removed as his counsel and to have Shelly Bannister, with whom he had developed a good relationship, appointed. He stated that he had lost 360 days good time credit for his altercation with counsel and the trial judge. Hall also testified that after he was found [**30] guilty on March 2, 1984, neither of his attorneys ever came to visit him or to discuss the importance of [*1425] preparing for the sentencing hearing before that hearing occurred on April 17, 1984. Neither of them informed him that a probation officer would visit him to prepare a presentence investigation report. When the probation officer attempted to see him at the prison, he refused the visit because he did not know the purpose of the visit. He therefore had no input into the content of the presentence investigation. Hall stated that prior to

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[2] Father Richard Means and Leta Powell testified in person at the hearing. By stipulation of the parties and agreement of the court, the testimony of the other eight witnesses was introduced through their affidavits only.

trial, he gave his attorneys a list of witnesses he wanted called which included the individuals whose affidavits the defense produced at this post-conviction hearing.

The State called Ahlemeyer and Skelton as its witnesses at the post-conviction hearing. Ahlemeyer testified that after the altercation with Hall, there "wasn't much" of an attorney-client relationship "at all from that point on." Ahlemeyer stated that, "frankly, I don't remember exactly talking to" Hall after the guilty verdict but prior to sentencing. However, he said that he must have gotten Dr. Shaddle's name from Hall at some point. Prior to trial, Ahlemeyer had tried to get Hall's [**31] mother and wife to attend the trial, but he was unsuccessful. He also had given one of them the sentencing date and told them "if they wished to appear that they were certainly welcome." Ahlemeyer said he knew Father Means by sight, but he had no recollection of talking to him, and he did not know if Means had ever called his office, but there would have been no reason to refuse to call him as a witness. Ahlemeyer testified that he was aware of what a mitigation expert is and that he was aware of their use at the time of the sentencing hearing although "they weren't so popular then." Ahlemeyer said he did not seek the service of a mitigation expert because, "I guess it is just because it wasn't being done . . . it was the type of thing that was just getting started, and I guess that's the reason."

On cross-examination, Ahlemeyer said that he had only moved to withdraw from 5 or 6 cases in 15 years of practice and that he only did so when "I am unable to assure them that I will act in their best interests." Ahlemeyer said he never discussed with Skelton who was the lead counsel on the case, and he did not recall

their dividing responsibilities. After the attack by Hall, Ahlemeyer made [**32] a report of the incident to the County Sheriff's Department. He was unaware whether the Department of Corrections ever took disciplinary action against Hall as a result of the incident.

Ahlemeyer said his strategy in preparing for sentencing was "to focus in on an argument based on just generally on the theory opposing the death penalty in all cases." This approach was taken because Ahlemeyer believed that the evidence in aggravation was overwhelming and that it was not "going to do a lot of good to Hall to try to prove that when he was thirteen years old he was a good boy." Ahlemeyer thought it was better to attack the death penalty because he knew Judge Caisley to be a very religious and sympathetic man. It was Ahlemeyer's judgment before sentencing "that mitigation was pretty scarce." Ahlemeyer did not remember ever attempting to contact Hall when he became aware that Hall was refusing to see the probation officer.

Skelton testified that his agreement on the division of labor with Ahlemeyer was that Ahlemeyer would handle the sentencing phase of the case by himself. Skelton said he never spoke to Hall after the guilty verdict until the day of sentencing and failed to inform Hall [**33] about the function of the probation officer. There had been some discussion with Hall about who he wanted to call at sentencing, but Ahlemeyer made the final decision. Skelton had no recollection of Father Means or Leta Mills or Hall's mother and wife ever trying to contact him to testify, but there was no reason Skelton was aware of as to why they would not have been called to testify if they had indicated a desire to do so.

On cross-examination, Skelton said that he was brought into the case because Ahlemeyer and Hall were not getting along, "to put it mildly." After entering the case, Skelton provided Hall with the discovery materials, something Ahlemeyer had not done. After he was hit by Hall, Skelton was questioned by the Sheriff's Department and photos were taken of his and the Judge's injuries. Skelton was not aware that Hall lost good time credits as a result of the incident. Skelton [*1426] moved to withdraw at that time because he believed the attorney-client relationship was irretrievably lost. Skelton said that it was "certainly" difficult for him to fulfill his obligations to his client. Skelton had a vague recollection of meeting with Father Means after sentencing and Means' [**34] inquiry as to why he had not been called to testify. He did not think he ever spoke to Hall about the nature of the presentence report. Skelton also testified that he would have called Hall's mother and his wife at sentencing if they had "been made available."

At the conclusion of the evidentiary hearing, the court made the following finding:

> What the evidence does establish is that the defense, for one reason or another, may have failed to call witnesses who would have testified as to Anthony Hall's good character, as to good deeds that he had done previously, and . . . that there are witnesses out there who were available and who might have been called by defense counsel to testify at the sentencing hearing as to other mitigating evidence . . .

The court ordered the parties to submit additional briefs on the question of "whether or not that incompetence of counsel is sufficient to grant [ ] relief."

After briefs were submitted, the court entered a written order on March 6, 1991, denying the post-conviction petition. The written findings included that the failure to call Hall's wife and his mother was excusable because "their indifference during the trial [as [**35] shown by their failure to be present] could certainly have been read to be a sign of hostility toward the defendant or of fear of him." The court found the failure to call Father Means not to be prejudicial because a clergyman of Hall's Jehovah's Witnesses faith, Lloyd Shaddle, had been called to testify at sentencing. The court concluded:

> Without exception, the affiants would have testified about Hall's character, and personality. . . . Certainly the court was interested in learning as much about Mr. Hall's character as possible. However, some of the affiants' testimony would have merely supported the court's own observations concerning Anthony Hall's character commencing with an initial conference with him on February 23, 1983, and continuing through the conclusion of the sentence hearing a little more than a year later. The court was exposed to Hall's friendliness and sociability. At times he could be very respectful and pleasant to be near. He seemed genuinely interested in court personnel and frequently conversed easily with them at recesses.

Thus, the court found that even if the witnesses had been called at sentencing, there would not be a reasonable probability [**36] that the sentence would have been different. The Illinois Supreme Court affirmed the denial of post-conviction relief.

ANALYSIS

I. Right to an Individualized Sentencing Decision

Petitioner claims that his constitutional rights under the Eighth and Fourteenth Amendments were violated when the trial judge was prevented, through his own erroneous understanding of the law, from imposing an individualized sentence upon him. In imposing Hall's death sentence, Judge Caisley stated:

> The choice in this case really boils down to two choices and both of them certainly have a cry to be heard and considered by this court. It is a choice between justice and a choice between mercy. If the choice were mine to make individually I would make a choice on the side of being merciful in sentencing this Defendant to a term of life imprisonment. . . . But I have also taken an oath to administer the laws of the State of Illinois in a manner that I best can, and it seems to me that it is my duty under the laws of the State of Illinois in following my oath of office as judge to sentence the Defendant, Anthony Hall, to death. . . . I think all of the aggravating factors are stacked [**37] against the Defendant. I think there has been a complete absence of mitigating factors. I am persuaded there is not reasonable doubt here, and so it is my unhappy duty under the laws of the State of Illinois to sentence Anthony Hall to death.

[*1427] Petitioner asserts that this language demonstrates the trial judge's erroneous belief that mercy could not be used as a mitigating factor in imposing Hall's sentence when in fact Illinois law does allow for such a factor to be considered. See Hall I, 499 N.E.2d at 1351 citing People v. Holman, 103 Ill. 2d 133, 170, 469 N.E.2d 119, 82 Ill. Dec. 585 (1984), cert. denied, 469 U.S. 1220, 84 L. Ed. 2d 347, 105 S. Ct. 1204 (1985) ("Mercy is a

relevant factor for consideration at a capital sentencing hearing, but it is to be considered within the context of all factors in aggravation and mitigation."). However, the Court finds that Judge Caisley properly applied the law at Hall's sentencing.

The purpose of individualized sentencing in the death penalty context is to ensure that the "sentencer has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence. Thus, the sentence imposed at the [**38] penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 492 U.S. 302, 319, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) (internal citation omitted). This underlying purpose is not served when a sentencing judge or juror invariably decides to impose the death penalty upon everyone who becomes eligible for it. See Morgan v. Illinois, 504 U.S. 719, 728, 119 L. Ed. 2d 492, 112 S. Ct. 2222 (1992) (internal citation omitted):

> Surely if in a particular Illinois case the judge, who imposes sentence should the defendant waive his right to jury sentencing under the statute, was to announce that, to him or her, mitigating evidence is beside the point and that he or she intends to impose the death penalty without regard to the nature and extent of mitigating evidence if the defendant is found guilty of a capital offense, that judge is refusing in advance to follow the statutory direction to consider that evidence and should disqualify himself or herself. Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the [**39] case without basis in the evidence developed at trial.

Likewise, the purpose behind individualized sentencing is equally not served when the sentencing authority invariably decides not to impose the death penalty out of a purely personal sense of mercy, regardless of the presence of aggravating factors. For instance, a juror may be excluded "for cause" where he has made unmistakably clear that he "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before [him]." Witherspoon v. Illinois, 391 U.S. 510, 522 n.21, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968) (emphasis in original). Because the death penalty is designed to be imposed according to the individual circumstances of the offense and characteristics of the offender, see Penry, 492 U.S. at 319; Gregg v. Georgia, 428 U.S. 153, 187, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976), it would be against the current dictates of Supreme Court precedent for a trial judge to disregard the relevant aggravating and mitigating factors at issue in a particular case. See California v. Brown, 479 U.S. 538, 542-43, 93 L. Ed. 2d 934, [**40] 107 S. Ct. 837 (1987) (holding that the decision to impose the death penalty should not be based on "extraneous emotional factors" such as "mere sympathy" that are unrelated to the particular aggravating and mitigating factors at issue in the case).

While this discussion may appear to digress from the issue at hand, it actually resolves it by explaining the language used by Hall's sentencing judge. Prior to the instant case, Judge Caisley had never sentenced anyone to death. Moreover, Judge Caisley had a reputation as being a very religious and sympathetic man. In fact, this is why Ahlemeyer's strategy at the sentencing hearing was to attack the death penalty in all cases rather than

focusing on the aggravating and mitigating factors particular to Hall. In his decision, Judge Caisley initially stated, "If the choice were mine to make individually, I would make a choice on the side of being merciful in sentencing this defendant to a term of life imprisonment." In [*1428] other words, if no statutory scheme existed to guide his decision, his personal sense of mercy would compel him to not impose the death penalty in any case.

However, realizing that such a ruling based upon mercy alone [**41] would offend the notion of individualized sentencing as well as Illinois law, Judge Caisley rightly chose instead to focus on the presence of aggravating and mitigating factors particular to Hall's case. Under this analysis, the court found that "all of the aggravating factors are stacked against the defendant," thus making him eligible for the death penalty under the statute. 720 ILCS 5/9-1(b). The court was then required to find at least one mitigating factor "sufficient to preclude" the imposition of the death penalty. 720 ILCS 5/9-1(h) (emphasis added).

It is at this point that Petitioner believes that Judge Caisley made a mistake of law and erroneously found that mercy could not be such a mitigating factor. However, a trial judge is presumed to know the law and to apply it in making his decisions. Walton v. Arizona, 497 U.S. 639, 653, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990). Nowhere in the record does Judge Caisley demonstrate an ignorance of the law. Rather, his failure to assert mercy as a mitigating factor sufficient to preclude the death penalty was a calculated decision on his part. The statute requires the sentencing authority to weigh the various aggravating [**42] and mitigating factors in

order to decide whether any mitigating factor is "sufficient to preclude" the imposition of the death penalty. Silagy v. Peters, 905 F.2d 986, 998 (7th Cir. 1990), cert. denied, 498 U.S. 1110, 112 L. Ed. 2d 1106, 111 S. Ct. 1024 (1991). In other words, the fact that the trial court feels some mercy for a defendant does not mean that mercy automatically constitutes a mitigating factor "sufficient to preclude" the death penalty; this determination must be made within the context of the aggravating factors also.

Thus, when Judge Caisley said, "I think there has been a complete absence of mitigating factors," he meant that there had been a complete absence of significant mitigating factors that would outweigh the aggravating factors stacked against Hall and be sufficient to preclude the imposition of the death penalty. This was a reasonable disposition of the case. By making this finding, Judge Caisley properly placed the relative mercy required by the statutory language and the United States Constitution above his personal sense of mercy unrelated to the particular circumstances of Hall's case. In this way, Judge Caisley's decision to impose [**43] the death penalty was more "individualized" in the constitutional sense than Petitioner's version would have him be.[3]

Because the language used by Judge Caisley at sentencing can be reasonably interpreted in accordance with

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[3] Petitioner questions why Judge Caisley would "waste judicial time saying that his choice boiled down to one between justice and mercy if he believed the choice was a fiction?" The answer is that such a statement was rhetorical and in fact depicted Judge Caisley's belief that his personal sense of mercy could not be used as a mitigating factor.

the Illinois Death Penalty Statute, Petitioner has failed to rebut the presumption that the trial judge correctly applied the law to the facts of the case. See Walton, 497 U.S. at 653. Accepting the factual findings of the Illinois Supreme Court as true, Purkett, 115 S. Ct. at 1771; 28 U.S.C. § 2254(d), the Court finds that Judge Caisley properly applied the laws of Illinois when he sentenced Hall to death. Thus, Petitioner's claim is [**44] denied.[4]

II. Ineffective Assistance of Counsel

Petitioner contends that his trial counsel, Ahlemeyer and Skelton, were constitutionally ineffective at the capital sentencing hearing because of their failure to: (1) present any of ten available mitigation witnesses; (2) hire a mitigation expert; and (3) assist in the preparation of the presentence report.

[*1429] To make out a claim of ineffective assistance of counsel under the Sixth Amendment, Petitioner must demonstrate that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for his attorney's unprofessional representation, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Failure to satisfy either [**45] of these prongs is fatal to such a claim. United States v. Slaughter, 900 F.2d 1119, 1124 (7th Cir. 1990). If a claim of ineffective assistance of counsel can be disposed of using

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[4] Because the Court believes that Judge Caisley's statements at sentencing are unambiguous as to his understanding of the law, no evidentiary hearing is necessary on this issue.

the prejudice prong alone, that course should be followed. Smith v. Lane, 794 F.2d 287, 290 (7th Cir. 1986); Strickland, 466 U.S. at 700.

The Court believes that Strickland itself is dispositive of Hall's first ground of ineffectiveness. In Strickland, the petitioner argued that his counsel had been constitutionally ineffective at the capital sentencing phase because his counsel had failed to present character witnesses on his behalf. 466 U.S. at 699. The Supreme Court in Strickland held that the petitioner had not met the "prejudice" prong of its test for attorney ineffectiveness:

> At most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that [**46] the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.

Id. at 700.

Likewise, in the instant case, Petitioner alleges that his counsel's failure to present ten mitigation witnesses at his capital sentencing hearing deprived him of his Sixth Amendment right to counsel. However, just as in Strickland, each of these witnesses is merely vouching for Hall's good character. Three witnesses (Powell, Hunt, and Robinson) would have provided examples of Hall's heroism in saving them or their children from incidents of drowning, choking, assault, and flat tires. Father Means would have testified that he "saw no evidence of violence in Mr. Hall and that Mr. Hall was honest,

sensitive, sociable, respectful, a good worker and pleasant to be around." O'Connor would have testified that Hall was "loyal, cooperative, reliable, nice, caring, concerned, patient, and trustworthy." Mickel would have stated that Hall was a "pleasant, hardworking student." Smith would have called Hall a "friendly, pleasant, fine young man." Hall's sister and wife would have made similar remarks about Hall's character. Hall's mother would have testified that [**47] she was only 13 years old when Hall was born and that he never knew his father.

However, these general allegations of Hall's good character and childhood deprivations hardly rebut the laundry list of aggravating evidence stacked against him. To begin with, Hall is a convicted murderer. He carried a knife to the cold storage area of the prison with the intent to murder Frieda King in cold blood. The number of wounds inflicted upon her body was evidence that she suffered a brutal death. Hall committed this murder despite his regular attendance at bible study classes in prison. He used his assignment in the inmate kitchen to commit the murder. He killed King while she was working in the course of her duties at the prison.

In addition, Hall had a considerable criminal history. He had allegedly held an inmate while two other inmates stabbed the victim. He had attempted to throw a man off the prison galley (although the prison report noted it as a fist fight). He had prior convictions for armed violence, armed robbery, and rape. One of his victims testified that he had robbed and raped her; another testified that he had robbed and attempted to rape her. He had been in prison since the [**48] age of sixteen (with the exception of two years). The court reasonably found that he

had no good chance for rehabilitation. Like the Supreme Court in Strickland, id., this Court finds that the overwhelming nature of the aggravating evidence negates any reasonable [*1430] probability that but for the exclusion of the ten mitigating witnesses, the result of the proceedings would have been different. Id. at 699.

Another factor that influences the Court's decision in this regard is the fact that Judge Caisley did hear these ten mitigation witnesses at Hall's post-conviction hearing and found:

> Without exception, the affiants would have testified about Hall's character, and personality. . . . Certainly the court was interested in learning as much about Mr. Hall's character as possible. However, some of the affiants' testimony would have merely supported the court's own observations concerning Anthony Hall's character commencing with an initial conference with him on February 23, 1983, and continuing through the conclusion of the sentence hearing a little more than a year later. The court was exposed to Hall's friendliness and sociability. At times he could be very respectful [**49] and pleasant to be near. He seemed genuinely interested in court personnel and frequently conversed easily with them at recesses.

On this basis, the trial court denied Hall's claim for post-conviction relief.

In light of the record, the Court believes that Judge Caisley's decision was sound.[5] Who better to know

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[5] At the sentencing hearing, Judge Caisley heard the testimony of Lloyd Shaddle, a minister of Hall's faith, who testified

(continued...)

whether the outcome would have been different than the same judge who had originally sentenced Hall to death?[6] See also Stewart v. Gramley, 74 F.3d 132, 1996 U.S. App. LEXIS 314, *11, 1996 WL 6623, at *3 (7th Cir. 1996) ("Since it is obviously not the theory of capital punishment that murderers are compelled to murder by their past and therefore should not be punished, it cannot be right that anything brought out at a death-penalty hearing is certain or even likely to help the defendant to save his life.")

The same can be said for Hall's second ground for asserting ineffective assistance of counsel at the sentencing phase—the failure to call a mitigation expert. At the conclusion of the evidence at the post-conviction hearing

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[5] (...continued)
that Hall regularly attended bible study classes and often expressed concern for his family. Thus, the testimony of Father Means would have been merely cumulative. Petitioner contends that Father Means' testimony would have been significant because "at the time of sentencing, Judge Caisley stated he would have found mitigating evidence of a desire for rehabilitation had Hall's studies with Shaddle continued after the murder." On the contrary, Judge Caisley merely stated that the fact that Hall committed the murder after attending Shaddle's bible study classes showed his lack of rehabilitation. It is highly illogical to think that Hall's continuing his bible study classes after the murder would have changed the court's mind on this matter. [**50]

[6] Of course, this should not be the result in every case in which the trial judge examines his previous decision with the benefit of hindsight. However, in this case, Judge Caisley's decision at the post-conviction hearing is amply supported by the record evidence. Thus, it merely sheds more light on the reasonable probability of whether the new evidence would have changed the result of the original proceeding.

regarding the need for a mitigation expert, Judge Caisley found that the testimony of such a expert would not have reasonably resulted in a different outcome. This was a reasonable finding in light of the aggravating evidence against Petitioner and the fact that mitigation experts were rarely used at the time of Hall's trial. Thus, that ground also does not meet the prejudice prong of Strickland.

As for the third ground, counsel's failure to participate [**51] in the preparation of the presentence report, it has been procedurally defaulted by Petitioner's failure to raise that issue in the post-conviction petition or on appeal to the Illinois Supreme Court from his sentence of death. See Jones v. Washington, 15 F.3d 671, 675 (7th Cir.), cert. denied, 129 L. Ed. 2d 870, 114 S. Ct. 2753 (1994) (holding that procedural default occurs where Petitioner does not raise the issue to the state's highest court on post-conviction review);[7] Reese v. Peters, [*1431] 926 F.2d 668, 671 (7th Cir. 1991) (holding that procedural default occurs where Petitioner fails to raise the issue on direct appeal or fails to raise the substantial denial of a constitutional right in the original or amended post-conviction petition). Nor has Petitioner established

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[7] In Hogan v. McBride, 74 F.3d 144, 1996 U.S. App. LEXIS 468, *8, 1996 WL 14277, at *3 (7th Cir. 1996), the Seventh Circuit held that in order to constitute a procedural default, the failure to raise a claim to the state's highest court on discretionary review must be made "on pain of forfeiture" under state law. However, Hogan is inapplicable to the instant case where review by the Illinois Supreme Court is a matter of right. See IL Const. Art. 6, § 4(b) ("Appeals from judgments of Circuit Courts imposing a sentence of death shall be directly to the Supreme Court as a matter of right.").

"cause and prejudice" for the default, Coleman v. Thompson, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991), or shown that he is "actually innocent" of the death penalty. Schlup v. Delo, 130 L. Ed. 2d 808, 115 S. Ct. 851, 862 (1995). Thus, the Court need not even consider that claim in this collateral proceeding. However, the Court notes that the overwhelming aggravating evidence against [**52] Hall would negate any reasonable probability of the result being different by counsel's involvement with the presentence report. Thus, the prejudice requirement of Strickland would not be met.

Petitioner cites a number of cases where counsel failed to present mitigating evidence at a death penalty sentencing hearing and the court found that the prejudice requirement of Strickland had been met. However, all of these cases are distinguishable. [**53] In the instant case, counsel did not fail to present mitigating evidence of diminished mental capacity or psychiatric problems, cf. Brewer v. Aiken, 935 F.2d 850, 857-59 (7th Cir. 1991); Wilson v. Butler, 813 F.2d 664, 671-73 (5th Cir. 1987), on reh'g, 825 F.2d 879, cert. denied, 484 U.S. 1079, 108 S. Ct. 1059, 98 L. Ed. 2d 1021 (1988); Hendricks v. Calderon, 70 F.3d 1032, 1995 WL 517211, at *10 (9th Cir. 1995), or of the absence of prior felony convictions. Cf. Lewis v. Lane, 832 F.2d 1446, 1457 (7th Cir. 1987), cert. denied, 488 U.S. 829, 102 L. Ed. 2d 59, 109 S. Ct. 83 (1988); Woodard v. Sargent, 806 F.2d 153, 157-58 (8th Cir. 1986). Nor was Petitioner's counsel suffering from personal problems which prevented him from putting on an effective defense. Cf. Dillon v. Duckworth, 751 F.2d 895, 897, 901 (7th Cir. 1984), cert. denied, 471 U.S. 1108, 85 L. Ed. 2d 859, 105 S. Ct. 2344 (1985) (counsel had recently divorced, his brother was paralyzed in an accident,

and his father had undergone emergency heart surgery, all of which prompted him to attest to his own professional incompetence).

In the instant case, Hall's counsel called three mitigating witnesses to the stand, attempted to [**54] contact Hall's wife and mother, and made an eloquent closing argument which appealed to the trial court's sense of mercy. Cf. Kubat v. Thieret, 867 F.2d 351, 367-68 (7th Cir.), cert. denied, 493 U.S. 874, 107 L. Ed. 2d 159, 110 S. Ct. 206 (1989) (defense counsel called no character witnesses at the sentencing hearing and his closing argument was "grossly substandard"); United States ex rel. Emerson v. Gramley, 883 F. Supp. 225, 243 (N.D. Ill. 1995) (counsel declined to introduce any mitigating evidence and submitted the case to the jury without argument); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir.), cert. denied, 474 U.S. 998, 88 L. Ed. 2d 367, 106 S. Ct. 374 (1985) (counsel failed to present any character witnesses at all); King v. Strickland, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 85 L. Ed. 2d 301, 105 S. Ct. 2020 (1985) (counsel failed to present available character witnesses and his "closing argument served only to dehumanize his client"); Gaines v. Thieret, 665 F. Supp. 1342, 1365 (N.D. Ill. 1987), rev'd on other grounds, 846 F.2d 402 (7th Cir. 1988) (counsel's exceedingly short closing argument provided no reason for the jury not to impose [**55] the death penalty). Thus, all of Petitioner's cases are inapposite and do not persuade the Court that prejudice has been adequately shown here.

While the Court could stop its analysis at this point on the basis that the lack of prejudice to Petitioner is dispositive of his claims, the Court wishes to clarify that

Hall cannot meet the first prong of Strickland either. In assessing whether counsel's representation fell below an objective standard of reasonableness, Strickland requires the Court to engage in a strong presumption that counsel has rendered adequate assistance and exercised reasonable professional judgment. 466 U.S. at 689. The test has nothing to do with what the best lawyers have done, nor even what most good lawyers would have done. We ask only whether some reasonable lawyer at the hearing could have acted, in the circumstances, as defense counsel acted at the hearing. Waters [*1432] v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc), cert. denied, 133 L. Ed. 2d 103, 116 S. Ct. 160 (1995). Moreover, every effort must be made to eliminate the distorting effects of hindsight and to evaluate counsel's performance from their perspective at the time of the [**56] relevant conduct. Id.

More specific to the instant case, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Id. at 690-91. Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation. Id. Because mitigation is a vaguer concept than guilt, what exactly counsel must do to determine the presence of factors mitigating the gravity of the defendant's conduct is less clear. Stewart, 74 F.3d 132, 1996 WL 6623, at *3. Presumably the lawyer is not required to investigate the defendant's past with the thoroughness of a biographer. The resources of defense lawyers are limited, and they have only a short time to prepare for the sentencing hearing. Id. See also Waters, 46 F.3d at 1514 ("That other wit-

nesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance [**57] of counsel . . . but perfection is not the standard of effective assistance.").

The Court believes that, as in Strickland, Hall's counsel made a strategic decision that made the particular investigations unnecessary. In Strickland, the petitioner's counsel decided not to present a number of available mitigation witnesses; rather, counsel's strategy was to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on the petitioner's acceptance of responsibility for his crimes. 466 U.S. at 699. The Supreme Court found that counsel had exercised reasonable professional judgment in this regard, reasoning:

> The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy [**58] ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate perfor-

> mance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

Id.[8]

[**59] Likewise, in the instant case, Ahlemeyer testified at the post-conviction hearing that his strategy in preparing for sentencing was "to focus in on an argument based on just generally on the theory opposing the death penalty in all cases." This approach was taken because Ahlemeyer believed that the evidence in aggravation was overwhelming [*1433] and that it was not "going to do a lot of good to Hall to try to prove that when he was thirteen years old he was a good boy." It was Ahlemeyer's judgment before sentencing "that mitigation was pretty scarce.' Ahlemeyer thought it was better to attack the death penalty because he knew Judge Caisley to be a very religious and sympathetic man who personally

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[8] See also Burger v. Kemp, 483 U.S. 776, 794-95, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987) (failure to submit any mitigating evidence was not constitutionally ineffective assistance where counsel's strategy was to emphasize the coindictee's culpability for the crime); Francis v. Dugger, 908 F.2d 696, 703 (11th Cir. 1990) ("We reject Francis's argument that his counsel rendered deficient assistance during the penalty phase of the trial. Trial counsel made a decision to deliver a highly impassioned, emotional argument which, rather than focusing on Francis, emphasized the Easter season, forgiveness, compassion, and the value of life. We cannot say that this strategy was unreasonable given counsel's reasoned belief (based upon previous conversations with the trial judge and the court's plea offers) that the trial judge would follow a life recommendation."); Kubat, 867 F.2d at 368 ("It is true . . . that in some cases counsel might reasonably make a decision to omit evidence in mitigation and rely instead on an alternative strategy, such as a plea for mercy.").

opposed the death penalty and had never previously sentenced anyone to death.

Thus, just as the petitioner's counsel in Strickland based his strategy on his belief that the judge would be sympathetic to someone who owned up to his crimes, Ahlemeyer based his strategy upon his belief that Judge Caisley was a religious and sympathetic man who would hesitate to impose the death penalty. Moreover, the aggravating circumstances in both Strickland and the instant case were so stacked against [**60] the defendant that the introduction of good character evidence would not have had a decisive effect upon the outcome. In both cases, some evidence in mitigation had already been introduced to show the petitioner's good character.[9] Here, Hall himself took the stand. His minister, Lloyd Shaddle, testified that Hall attended bible study classes—and expressed concern for his family. A psychiatrist, Dr. Syed Ali, who had examined Hall, testified that he found Hall to be anxious and depressed about the forthcoming sentence. Moreover, Ahlemeyer contends that he attempted to get Hall's wife and mother to attend the trial and the sentencing hearing, but that he was unsuccessful. These similarities between Strickland and the instant case demonstrate Ahlemeyer's use of reasonable professional judgment in not calling the ten mitigation witnesses presented by Hall.[10]

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[9] Petitioner's claim is simply not true that his trial counsel "complete[ly] abandoned their duty to investigate for mitigating evidence."

[10] There is one significant difference between Strickland and the instant case. In Strickland, counsel's restriction of character evidence ensured that contrary character and psychological

(continued...)

[**61] Moreover, petitioner's lack of cooperation contributed to the alleged ineffectiveness in this case and reinforces the Court's finding that reasonable professional judgment was exercised here. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Id. at 691. What investigation decisions are reasonable depends critically on such information. Id. Conversely, where the petitioner's deliberate noncooperation has adversely affected counsel's ability to represent him, petitioner cannot then turn around and claim that his counsel was constitutionally ineffective. See Davis v. Greer, 13 F.3d 1134, 1139 (7th Cir.), cert. denied, 130 L. Ed. 2d 287, 115 S. Ct. 328 (1994) (no Sixth Amendment violation where petitioner refused to allow counsel to present evidence of his mental condition at his capital sentencing hearing); Resnover v. Pearson, 965 F.2d 1453, 1460 (7th Cir. 1992), cert. denied, 124 L. Ed. 2d 685, 113 S. Ct. 2935 (1993) (no Sixth Amendment violation where petitioner "deliberately absented himself from the penalty phase of the trial over the strong protestations of his counsel"); United States ex [**62] rel. Kleba v. McGinnis, 796 F.2d 947, 957 (7th Cir. 1986) (holding that the defendant was "the one primarily responsible" for failing to

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[10] (...continued)
evidence and respondent's criminal history would not come in. Here, however, Hall's criminal history was already before Judge Caisley in the presentence report. Nevertheless, the Court does not believe that this difference is enough to distinguish the instant case from that of Strickland. In Strickland, the Court found reasonable professional judgment "even without application of the presumption of adequate performance." When that presumption is applied here, Ahlemeyer's conduct must be deemed professional.

locate a key witness; because the defendant failed to inform counsel of that witness, counsel's failure to locate her was not deficient).

The record is replete with examples of Petitioner's complete lack of cooperation, including his own repeated declarations that he would not assist or cooperate with his defense counsel in any way. For instance, Hall refused to allow visits from Ahlemeyer and the probation officer into the prison. It is no wonder, then, that Hall's counsel did not have the opportunity to rebut the State's presentence report. Petitioner asserts that, "after the physical assault [in chambers], Mr. [*1434] Hall cooperated with his counsel throughout the rest of the trial and sentencing hearing." However, Ahlemeyer's testimony that after the assault, he did not have much of a relationship with Hall "from that point on," belies this assertion.[11]

[**63] Ahlemeyer also testified at the post-conviction hearing that he believed Hall's conduct was "just an act" intended to "create error" at trial so that his conviction and sentence would be overturned. The Illinois Supreme Court came to this same conclusion on direct review. Hall I, 499 N.E.2d at 1346. There are a number of specific instances in the record which support this view. For instance, Hall testified that his refusal to cooperate with

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[11] Moreover, it is unreasonable for Hall to expect that his counsel had a constitutional duty to inform him that he should allow the probation officer to visit him in prison so that he could respond to the presentence report. In light of Hall's previous belligerent behavior against Ahlemeyer, Skelton, and Judge Caisley, Ahlemeyer could reasonably have believed that Hall would have refused the visit with the probation officer even if he had understood the nature of the visit.

Ahlemeyer was a "deliberate and rational act" and stated in open court:

> I am not going to cooperate with him and if he comes within an arm's length of me I will spare you the particulars. If this is what I have to do to get him off this case, I will rise to that occasion. I can only get an assault charge.

Ahlemeyer testified that Hall later told him, "well, you know, that last little threat I made was just for business, you know, and nothing personal." Hall also sent a letter to Ahlemeyer which stated the following:

> I'm willing to rises to other measures as much as I deem necessary to secure Attorney other than local "P.D." or private counsel. Herethereafter sir, do not come withend arm length of my presents. I'll spare [**64] you the particulars, but I will follow through on this promise.

(grammatical errors in original).

It is also highly unusual that Hall would waive the jury and choose Judge Caisley to determine both his guilt and his sentence after he had just physically attacked the court. When questioned in the post-conviction proceeding about his jury waiver decision, Hall denied that he did it in order to create error or because he knew the judge was not likely to impose the death penalty. However, he could not point to any single event that prompted him to change his mind in this regard. One logical conclusion is that he wanted the judge to decide the case in order to introduce error into the proceedings. Thus, the Court has no reason to doubt the Illinois Supreme Court's factual findings on this matter and must accept them as true. Purkett, 115 S. Ct. at 1771; 28 U.S.C. § 2254(d).

Hall's actions in refusing to cooperate with his counsel detrimentally affected his counsel's ability to gather mitigating evidence for the sentencing hearing. "In assessing an investigation, if certain evidence or witnesses could not reasonably have been discovered without the defendant's cooperation [**65] and the defendant did not cooperate, defense counsel's failure to find the evidence cannot be ineffective assistance." Kleba, 796 F.2d at 961 (Cudahy, J., concurring in part and dissenting in part). See also Davis, 13 F.3d at 1139; Resnover, 965 F.2d at 1460; Kleba, 796 F.2d at 957. This further detracts from Hall's ineffective assistance claim here. While Hall did apparently give counsel a list of potential character witnesses prior to the sentencing hearing, his failure to discuss those witnesses with counsel or the information they might provide supports the presumption that Ahlemeyer and Skelton were effective here.

As for counsel's failure to present a mitigation expert at the sentencing hearing, Ahlemeyer testified that while he was aware of the existence of a mitigation expert at the time, "they weren't so popular then." He explained, "I guess it is just because it wasn't being done . . . it was the type of thing that was just getting started." Skelton also testified that he was not aware of the notion of mitigation experts in 1984. In light of the cautionary holding in Strickland that every effort must be made to eliminate the distorting effects of hindsight [**66] and to evaluate counsel's performance from their perspective at the time of the relevant conduct, 466 U.S. at 689, the Court finds that [*1435] Ahlemeyer's failure to present a mitigation expert in 1984 was reasonable and did not constitute ineffective assistance of counsel. Petitioner fails to cite any constitutional requirement that a miti-

gation expert be called to testify either in 1984 or at the present time. Absent such a requirement, it was not unprofessional of Hall's counsel to fail to call one.

In addition, Judge Caisley stated on post-conviction review that, "normally, there is no pre-sentence report prepared at all in capital cases" because the matter goes straight to the jury for sentencing. It was only because there happened to be a bench trial and a period of time existed between Hall's conviction and the sentencing hearing that such a report was ordered. Under such circumstances, the Court cannot say that counsel's failure to be involved with the preparation of the presentence report constituted constitutionally ineffective assistance.

In sum, Petitioner has failed to meet either requirement under Strickland for proving constitutionally ineffective assistance of counsel. [**67] Moreover, his argument regarding the presentence report has been procedurally defaulted. Thus, the Court denies Petitioner's Sixth Amendment claims.

III. Jury Sentencing Waiver

Petitioner asserts that his rights under the Eighth and Fourteenth Amendments were violated in that he did not knowingly and intelligently waive his right to a sentencing jury because neither the court nor counsel informed him that a jury's decision to impose the death penalty must be unanimous. This argument states a federal constitutional claim. See Hicks v. Oklahoma, 447 U.S. 343, 346, 65 L. Ed. 2d 175, 100 S. Ct. 2227 (1980). However, it is foreclosed by United States ex. rel. Wandick v. Chrans, 869 F.2d 1084, 1088-89 (7th Cir. 1989) citing United States ex rel. Williams v. DeRobertis, 715 F.2d

1174, 1179-81 (7th Cir. 1983), cert. denied, 464 U.S. 1072, 79 L. Ed. 2d 219, 104 S. Ct. 982 (1984), in which the Seventh Circuit held that there is no constitutional right to be informed of the unanimity requirement under Illinois law in order to effectively waive one's right to a jury trial.

While Wandick dealt with the application of a jury waiver to the guilt phase of the trial, the Court does not believe [**68] that the Seventh Circuit would change its holding simply because the jury waiver here applies to the capital sentencing phase. In either phase of the trial, the same underlying rationale applies that the defendant need not be given "an exhaustive knowledge of all the doctrinal subtleties of Sixth Amendment jurisprudence" in order to effectuate a jury waiver. 869 F.2d at 1088-89 citing Williams, 715 F.2d at 1179-80.[12]

Petitioner argues that the differences between the jury scheme in the guilt phase and the sentencing phase in Illinois is a "unique circumstance" which merits finding a constitutional violation here. During the guilt phase, the jury must return a unanimous verdict of guilt or acquittal in order to complete the trial; however, at the death penalty sentencing phase, the [**69] jury must unanimously vote for the death penalty or the defendant is automatically sentenced to life imprisonment. Such a circumstance is hardly "unique" to Hall; every person charged with the death penalty in Illinois has undergone this two phase trial. Yet, no court in Illinois or the

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[12] The Court's prior finding that Hall's counsel were constitutionally effective also supports the fact that Hall knowingly waived his right to a jury trial. Chrans, 869 F.2d at 1088; Williams, 715 F.2d at 1182.

Seventh Circuit has found the failure to inform a defendant of the unanimity requirement in the sentencing phase to be a constitutional violation, and the Court declines to do so here. The fact that Hall had already undergone two trials and understood only the guilt phase method of jury deliberation is not enough to change the Court's opinion on this issue.

In addition, the fact that Hall decided to revoke his jury waiver "at the earliest possible time after he learned of the unique unanimity provision" does not change this result. First, there can be no constitutional violation where the constitutional right upon [*1436] which it is allegedly based is nonexistent.[13] Chrans, 869 F.2d at 1088-89. Second, the time lapse between the waiver decision and Hall's change of mind is irrelevant. Once an effective waiver has been completed, it is final. Otherwise, there would be no repose to such decisions. For [**70] these reasons, Petitioner's claim must be denied.

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[13] In Williams, the Seventh Circuit appeared to condition its holding on the following factors: "the defendant was represented by competent counsel, there were no extenuating circumstances to indicate that these particular attributes would have been of particular significance to the defendant, and there is no indication or allegation that the ensuing bench trial was in any way unfair." 715 F.2d at 1181. However, the Court does not believe that these factors are crucial to the Seventh Circuit's holding in Williams. The Seventh Circuit's subsequent holding in Chrans, which relied upon Williams, reaches the same conclusion without setting forth all of those extenuating factors. 869 F.2d at 1088-89. Only the competence of trial counsel was discussed. Id. at 1088.

IV. The Trial Judge's Failure to Recuse Himself

Next, Petitioner argues that his rights under the Eighth and Fourteenth Amendments were violated because Judge Caisley refused [**71] to recuse himself after Hall had physically attacked him. Even in a death case, bad appearances alone do not require disqualification of a judge. Del Vecchio v. Illinois Dept. of Corrections, 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc), cert. denied, 131 L. Ed. 2d 290, 115 S. Ct. 1404 (1995). There is a presumption of "honesty and integrity of those serving as adjudicators." Id. at 1375 quoting Withrow v. Larkin, 421 U.S. 35, 47, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975). Recusal is required only when the biasing influence is strong enough to overcome that presumption so that we may presume actual bias. Id. This occurs in situations "in which experience teaches that the possibility of actual bias is too high to be constitutionally tolerable." A court must be convinced that the particular influence, "under a realistic appraisal of psychological tendencies and human weakness," poses "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Id. quoting Withrow, 421 U.S. at 47. An example of this is a situation in which the judge has a direct pecuniary interest in the [**72] outcome of the case. 31 F.3d at 1373.

However, the Seventh Circuit in Wilks v. Israel, 627 F.2d 32 (7th Cir. 1980), cert. denied, 449 U.S. 1086, 66 L. Ed. 2d 811, 101 S. Ct. 874 (1981), found that a defendant's physical attack of a judge does not constitute a situation in which bias can be presumed. In that case, the defendant had acted uncooperatively during the pretrial proceedings. At a pretrial hearing, he threw a

stamping machine and microphone at the judge. At one point, while he was on the witness stand and the jury was not in the courtroom, he jumped out of his chair and physically assaulted the judge. Id. at 36. Immediately after the assault, the judge stated:

> I am going to say it for the record, he is going away for so long they are going to forget that they ever knew him, and I want any reviewing court to know what my intentions are.

Id. Later, the judge relented and stated that he would treat the defendant fairly for the rest of the trial. In fact, a review of the record revealed that the defendant had received a fair trial. Id. at 37.

The Seventh Circuit held that in order to prove a constitutional violation, the defendant had [**73] to show that the refusal to recuse was a "fundamental defect which inherently results in a complete miscarriage of justice." Id. at 37 quoting Hill v. United States, 368 U.S. 424, 428, 7 L. Ed. 2d 417, 82 S. Ct. 468 (1962). The court found that "as could be expected, the trial judge reacted adversely to the petitioner's unruly behavior." Id. However, the court held:

> A petitioner's deliberate attack on the trial judge calculated to disrupt the proceedings will not force a judge out of a case. Mayberry v. Pennsylvania, 400 U.S. 455, 463, 91 S. Ct. 499, 504, 27 L. Ed. 2d 532 (1971). To permit such an attack to cause a new [*1437] trial before a new judge would encourage unruly courtroom behavior and attacks on the trial judge and would greatly disrupt judicial administration.

Id. The Seventh Circuit then reviewed the entire record to find any evidence of actual bias. When none was

found, the court concluded that no constitutional violation had occurred. Id.

In response to the petitioner's argument that the test should be the appearance of prejudice, not actual prejudice, the Seventh Circuit held:

> Petitioner's argument, as we read it, would [**74] require a judge to remove himself from a case every time a defendant attacks him. In fact, the more vicious the attack the stronger the argument for recusal would be. We decline to adopt such a per se rule. Instead, we will examine the trial to ensure that the trial judge, despite good cause for adverse feelings toward a defendant, has conducted a fair trial.

627 F.2d at 37 n.6. Thus, using the policy that a defendant should not be able to profit from his own misconduct, the Seventh Circuit has struck a balance requiring recusal in the event of a physical attack on the judge only when the reviewing court finds actual bias in the record, and not merely the appearance of bias.

Petitioner argues that Wilks is distinguishable. The judge who was attacked in Wilks merely presided over a jury trial and played no role in deciding the fate of the defendant, id. at 37, while here, Judge Caisley conducted a bench trial and made the decision to sentence Hall to death. However, the Court does not believe that this is a valid distinction. Even after the attack on Judge Caisley and his refusal to recuse himself from the case, Hall made a conscious decision to have Judge Caisley [**75] decide his sentence. Because Hall could have chosen a jury sentencing, but deliberately decided to forgo that right, he cannot now complain that the mere appearance of bias by the judge is a constitutional vio-

lation. A contrary rule would encourage defendants to attack their judges and waive their right to a jury so as to create error at the trial.

In reviewing the record in the instant case, the Court can find no evidence of actual bias by the judge. All of Petitioner's arguments on this issue ring hollow. There is no indication in the record that Judge Caisley considered Hall's attack upon him to be an aggravating factor in his decision to impose the death penalty. Petitioner's singular citation to Judge Caisley's remark that, "at times, [Hall] could be very respectful," is taken out of context and proves absolutely nothing about Judge Caisley's supposed bias against Petitioner. Petitioner's other attempts to show actual bias are also futile and are based on erroneous assumptions of fact and law. For instance, the mere fact that Judge Caisley did not allow Hall's counsel to withdraw on the eve of trial is not a valid ground by which to show actual bias.[14]

[**76] Nor do the cases cited by Petitioner stand for the proposition that Judge Caisley had to consider the assault in order to render a properly individualized decision in Hall's case. While the sentencing authority has the obligation to consider "the character and record of the individual offender and the circumstances of the particular offense," Woodson v. Carolina, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976), it need only con-

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[14] Contrary to Petitioner's assertions, Judge Caisley's statement at the sentencing hearing that there was no evidence in mitigation was a valid interpretation of Illinois law (as explained in Part I above). Moreover, Judge Caisley's finding at the post-conviction hearing that Father Means' testimony was merely cumulative of Dr. Shaddle's was also reasonable (as explained in footnote 5 above).

sider the evidence presented by the parties at the hearing.

There is no requirement that the sentencing authority make an independent investigation into the defendant's life or rely upon personal knowledge concerning his character, nor would it be proper to do so. See Dotson v. Peabody Coal Co., 846 F.2d 1134, 1138 (7th Cir. 1988) ("It is unfair and irrational for the trier of fact to rely on evidence outside the record."); People v. Barnes, 48 Ill. App. 3d 226, 363 N.E.2d 50, 53, 6 Ill. Dec. 521 (1st Dist. 1977) ("A trial [*1438] judge, sitting as the trier of fact, is limited to the record made at trial, and a determination made by him based upon private knowledge constitutes a denial of due process."). Here, neither the prosecution nor defense [**77] counsel introduced any evidence regarding the assault upon Judge Caisley. Thus, Judge Caisley had no obligation to consider the assault upon him as an aggravating factor at the sentencing hearing and can be presumed not to have done so. See United States v. Miller, 800 F.2d 129, 136 (7th Cir. 1986) ("As a legal matter the district court [in a bench trial] is presumed to have considered only relevant and admissible evidence in reaching its factual findings.").

In light of the Seventh Circuit's holdings in Del Vecchio and Wilks, the Court finds that no constitutional violation exists here. The Court also holds that Petitioner's reliance on Mayberry and In re Murchison, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955), is inapposite. In Mayberry, the United States Supreme Court held that a judge who had been subject to repeated insults upon his character during trial could not preside over a separate contempt proceeding against the defendant. 400 U.S. at 466. However, Mayberry concerned due process protec-

tions for the contemnor, a separate proceeding from the trial in which the contempt arose. The Court made clear that a trial judge, by means of personal [**78] attacks by a defendant, could not be driven out of an ongoing case, such as in the present situation. Id. at 463. See Wilks, 627 F.2d at 37 n.5 (explaining this distinction).

Similarly, in Murchison, the Supreme Court found that the defendants' due process rights had been violated where the judge had acted as a one man grand jury in investigating and bringing contempt charges against the defendants and had subsequently sat in judgment on those charges. 349 U.S. at 137-38. The Supreme Court reasoned that due process was violated because the judge relied upon his own personal knowledge of the grand jury proceedings in order to convict the defendants. Id. at 138. By contrast, here Petitioner has failed to show that Judge Caisley took the assault upon him into account when he decided to sentence Hall to death. Moreover, he played no direct role in the prison's revocation of Hall's good time credit for the assault. Thus, because Judge Caisley did not use his own personal knowledge in sentencing Hall, Murchison is inapposite. For these reasons, Petitioner's claim must be denied.

V. "Irretrievable Loss" of the Attorney-Client Relationship

Petitioner [**79] also contends that his constitutional right to effective assistance of counsel under the Sixth and Fourteenth Amendments was violated because the attorney-client relationship had been "irretrievably lost." There can be no doubt that the relationship between Hall and Ahlemeyer and Skelton was strained. On vari-

ous occasions, Hall asked for new counsel or to proceed pro se while Ahlemeyer requested to withdraw as counsel due to Hall's noncooperation. Hall even threatened Ahlemeyer in open court and sent him a threatening letter, which resulted in Hall being shackled at Ahlemeyer's request. Hall also stated in court that he was "afraid" of Ahlemeyer. This situation culminated in Hall's physical assault on Ahlemeyer and Skelton just one day before his trial was to begin. After the attack, both Ahlemeyer and Skelton made a motion to withdraw from the case, stating that they could not "ethically or morally" proceed on Hall's behalf and that the attorney-client relationship had been "irretrievably lost." Judge Caisley denied the motion, stating that "under the circumstances, just minutes before trial is to begin I don't think at this point I can in all fairness allow defense counsel to [**80] withdraw."

The State first counters that Hall's ineffective assistance claim was not fairly presented to the Illinois courts as a constitutional issue and thus fails to state a claim qualifying for federal habeas relief. In order to be entitled to federal habeas relief, the petitioner must have presented both the relevant facts and controlling legal principles of federal law or the U.S. Constitution to the state courts. Picard v. Connor, 404 U.S. 270, 277, 30 L. Ed. 2d 438, 92 S. Ct. 509 [*1439] (1971). In Verdin v. O'Leary, 972 F.2d 1467, 1473-74 (7th Cir. 1992) citing Daye v. Attorney General of State of N.Y., 696 F.2d 186, 194 (2d Cir. 1982) (en banc), the Seventh Circuit adopted a "fair presentment" test to determine whether a petitioner has fairly presented an issue to the state courts so as to avoid procedural default:

> If petitioner's argument to the state court did not: (1) rely on pertinent federal cases employing constitutional analysis; (2) rely on state cases applying constitutional analysis to a similar factual situation; (3) assert the claim in terms so particular as to call to mind a specific constitutional right; or (4) allege a pattern of facts [**81] that is well within the mainstream of constitutional litigation, then the court will not consider the state courts to have had a fair opportunity to consider the claim. However, the presence of any one of these factors, particularly factors (1) or (2), does not automatically avoid a waiver; the court must consider the facts of each case.[15]

What is important is that the substance of the federal claim be fairly presented to the state court. 972 F.2d at 1474.

In the instant case, Hall argued to the Illinois Supreme Court that the trial judge had erred in refusing to appoint new counsel after Hall struck Skelton on the head with a chair. Hall I, 499 N.E.2d at 1344-45. Hall asserted that because of that incident as well as his previous complaints about representation, he had [**82] "good cause" under Ill. Rev. Stat. 1971 ch. 38, par. 113-3(b) to replace the public defender with private court-appointed counsel. Id. The Illinois Supreme Court analyzed Hall's claim under the revised statutory language which required a showing of "prejudice" to the defendant by the appointment of the public defender, and found no such prejudice because the problems in repre-

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[15] While the fair presentment test was devised to analyze the exhaustion of state remedies, the Seventh Circuit in Verdin held that the test was also useful in analyzing procedural default under § 2254. 972 F.2d at 1473.

sentation had resulted from Hall's own misconduct. Id. at 1345-46.

The Court believes that the second and fourth factors in Verdin have been satisfied here. In its decision, the Illinois Supreme Court relied in part upon "state cases applying constitutional analysis to a similar factual situation" when it cited two Illinois cases for the proposition that the "defendant [is] estopped from asserting ineffective assistance of counsel when [the] claim arises from [the] defendant's lack of cooperation." Hall I, 499 N.E.2d at 1346. Moreover, Petitioner alleged a "pattern of facts that is well within the mainstream of constitutional litigation." In order to establish the need for replacing the public defender with private counsel, Petitioner necessarily had to allege facts showing how the public [**83] defender had been ineffective at his trial so as to cause "prejudice" under the statute. A similar factual pattern arises in almost every case involving constitutionally ineffective assistance of counsel where reasonable assistance and prejudice must be established. Strickland, 466 U.S. at 687. Thus, the Court finds that Petitioner's claim was properly presented to the state courts and is not procedurally defaulted here. Verdin, 972 F.2d at 1473-74.

However, Petitioner's claim cannot succeed on the merits. As noted in Part II above, it was Hall's own misconduct and failure to cooperate with his counsel that ultimately led to his counsel's inability to represent him to the best of their ability. This type of behavior precludes a finding of constitutionally ineffective assistance of counsel. See Davis, 13 F.3d at 1139; Resnover, 965 F.2d at 1460; Kleba, 796 F.2d at 957.

From the very start of Ahlemeyer's representation, Hall wrote letters to Judge Caisley complaining that he was unable to establish a rapport with Ahlemeyer out of fear that the public defender's ties to the community and political concerns would weaken his ability to represent Hall. Hall also alleged [**84] that a "conflict of interest" between himself and Ahlemeyer would be an "understatement." However, Hall cannot point to even one specific instance in which Ahlemeyer was actually deficient in representing him. Hall cannot use his paranoid fantasies of collusion between the prosecution and public defender's [*1440] office to create an actual conflict of interest in the attorney-client relationship. Absent some factual basis for these allegations, Hall was completely out of order in refusing to cooperate with his counsel.

Hall's harassing behavior continued throughout the pretrial period when he threatened to assault Ahlemeyer in open court and wrote Ahlemeyer a letter reiterating this view. When Judge Caisley did try to accommodate Hall by appointing Skelton as co-counsel, Hall returned the favor by striking Skelton on the head with a chair and Judge Caisley on the head with his fist. Hall's belligerent behavior in refusing to see Ahlemeyer or any other court officer in prison further detracted from his counsel's ability to adequately represent him. Despite these self-destructive incidents, the Court agrees with the Illinois Supreme Court that "Ahlemeyer and Skelton performed competently before [**85] and during trial despite their unhappy position of being between the defendant's wish that they be discharged and the court's insistence that they remain as counsel." Hall I, 499 N.E.2d at 1345.

Petitioner attempts to improperly shift the focus of the ineffective assistance inquiry to counsel's state of mind

concerning the attorney-client relationship. However, the Seventh Circuit has found that "the focus of Strickland is on the performance of counsel rather than his state of mind." Kleba, 796 F.2d at 954 (emphasis added). Thus, "an allegation that an attorney was unwilling to serve as defense counsel is insufficient to overcome the [Strickland] presumption that counsel has 'rendered adequate assistance.'" Id. This accounts for Ahlemeyer and Skelton's own remarks that the attorney-client relationship had been "irretrievably lost" and their various motions to withdraw as counsel. Despite these remarks, the record reveals that Hall's representation by counsel was fair and unbiased. Thus, the Court cannot find a constitutional violation here.[16]

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[16] Petitioner cites to Holloway v. Arkansas, 435 U.S. 475, 484-86, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978), for the proposition that Judge Caisley was obligated to heed counsel's concerns that they could no longer represent Hall after he assaulted them in chambers. However, Holloway is one in a series of cases involving "an actual conflict of interest" that are distinct from Strickland's cause and prejudice test. Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980). An actual conflict of interest results if "the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests." Stoia v. United States, 22 F.3d 766, 771 (7th Cir. 1994). Examples of such conflicts include the representation of multiple defendants, Cuyler, 446 U.S. at 349-50, and the representation of a defendant after counsel had signed a consent decree with the district attorney's office stating that he would not represent such clients. Stoia, 22 F.3d at 772.

Another line of cases in which Strickland does not apply includes situations where actual or constructive assistance of counsel has been denied altogether during a critical stage of the proceedings. Perry v. Leeke, 488 U.S. 272, 279, 102 L. Ed. 2d 624, 109 S. Ct. 594 (1989); see, e.g., United States ex rel.

(continued...)

[**86] Hall wishes to justify his misconduct against his attorneys by alleging that Judge [*1441] Caisley wrongfully refused to replace the public defender with private counsel of his own choice. The Sixth Amendment right to counsel does afford a defendant a "fair opportunity to secure counsel of his own choice." Kleba, 796 F.2d at 951-52 citing Powell v. Alabama, 287 U.S. 45, 53, 77 L. Ed. 158, 53 S. Ct. 55 (1932). However, this does not hold

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[16] (...continued)

Thomas v. O'Leary, 856 F.2d 1011, 1016-17 (7th Cir. 1988) (where counsel failed to file a brief on appeal from the trial court's suppression order, prejudice need not be shown); Siverson v. O'Leary, 764 F.2d 1208, 1217 (7th Cir. 1985) (where counsel was completely absent during jury deliberations and the return of the verdict, prejudice need not be shown). A subset of such cases occurs when the state interferes with counsel's representation so as to deprive the defendant of assistance during a critical stage of the proceedings. See, e.g., Geders v. United States, 425 U.S. 80, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (1976) (where court denied defendant access to his counsel during a 17 hour recess in the trial, prejudice need not be shown to prove constitutionally ineffective assistance).

However, the instant case bears no resemblance to these cases. Ahlemeyer and Skelton were not forced to "make a choice advancing [their] own interests to the detriment of [their] client's interests." Stoia, 22 F.3d at 771. The possibility that they might have to testify against Hall was speculative at best. Nor was the assistance of counsel denied altogether at any critical stage in this case. Perry, 488 U.S. at 279. Petitioner's counsel were present at all stages of the trial and represented him to the best of their ability in light of Hall's own misconduct. During the guilt phase, Hall was able to pass notes to his counsel in order to assist in his representation. At the sentencing phase, counsel put on three witnesses, attempted to procure two more, and made an eloquent closing argument to the court. Thus, Holloway and Cuyler are inapplicable to the instant case and Petitioner's reliance upon those cases to show that Judge Caisley was obligated to grant defense counsel's motion to withdraw is unfounded.

true when the defendant is indigent and the State legislature has set up an exclusive system by which to appoint the Public Defender as counsel for such persons. An indigent has no absolute right to counsel of his choice. United States v. Davis, 604 F.2d 474, 478 (7th Cir. 1979) citing United States v. Hampton, 457 F.2d 299, 301 (7th Cir.), cert. denied, 409 U.S. 856, 34 L. Ed. 2d 101, 93 S. Ct. 136 (1972). A court's policy "not to honor a defendant's request for the appointment of a particular attorney is rational and reasonably necessary to the orderly administration of the system of providing defense services to those financially unable to retain counsel on their own." Id.

Moreover, the Sixth Amendment "does not give an [**87] accused the power to manipulate his choice of counsel to delay the orderly progress of his case." United States v. Robinson, 20 F.3d 270, 275 (7th Cir. 1994). The exercise of the right to counsel of choice "must at times give way to the need for a fair and efficient administration of justice." Id. A criminal defendant cannot use gamesmanship to create a conflict of interest with his own attorney in order to obtain newly appointed counsel. Atkins v. Wright, 843 F. Supp. 457, 460-61 (N.D. Ind. 1994).

While in hindsight, Judge Caisley's decision not to allow Ahlemeyer and Skelton to withdraw might have been a hasty one, it was not an abuse of discretion, and certainly not a violation of the Sixth or Fourteenth Amendments. Hall's use of gamesmanship[17] to achieve

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[17] See the discussion in Part II above for evidence in the record that Hall's misconduct might have been a deliberate strat-

(continued...)

his goal of obtaining new counsel backfired against him by negating the assistance of his present counsel. However, this was not a good reason for the trial court to grant Hall's request. Such a ruling would only encourage defendants to use the Sixth Amendment "to manipulate [their] choice of counsel to delay the orderly progress of [their] case." Robinson, 20 F.3d at 275.

[**88] Petitioner focuses only upon Judge Caisley's denial of Ahlemeyer and Skelton's motion to withdraw after the attack in chambers. However, this decision cannot be viewed in a vacuum. At numerous times in the past, Hall had unjustifiably attempted to replace his counsel. The trial had been continued for almost a year in order to accommodate Hall's requests for new counsel and his refusal to cooperate with his present counsel. Finally, the day before the trial was to begin and after the jury had been selected, Hall attacked the judge and counsel in chambers. If Judge Caisley had allowed Ahlemeyer's and Skelton's motion to withdraw at that point, Hall would have succeeded in disrupting the entire trial.

Even at this point, Judge Caisley gave Hall another chance to proceed pro se. However, during the court's questioning to determine whether his waiver of counsel was knowing and voluntary, Hall once again became belligerent and claimed that he did not understand anything the court was telling him. Thus, the court properly

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[17] (...continued)
egy to create reversible error at his trial. See also Hall I, 499 N.E.2d at 1346 ("The record clearly shows that the defendant embarked on a deliberate course designed to delay and disrupt his trial, and error cannot be reasonably found in the court's denial of a substitution of counsel.").

found that Hall's decision was not intelligently made and proceeded with the trial. Under these circumstances, the Court cannot fault Judge Caisley for proceeding [**89] with the trial and refusing counsel's motion to withdraw. Thus, the Court denies Petitioner's ineffective assistance of counsel claim here.

VI. Full and Fair Hearing on Post-Conviction Review

Petitioner asserts that he was denied a full and fair hearing on state post-conviction review because Judge Caisley: (1) refused to allow an expert in the defense of capital cases to testify regarding the ineffectiveness of Hall's trial counsel; (2) failed to appoint a mitigation expert to help establish prejudice [*1442] in trial counsel's ineffective performance; and (3) failed to recuse himself from the post-conviction proceedings.

Habeas relief is only appropriate when a petitioner is being held in violation of the Constitution, treaties, or laws of the United States. Escobar v. O'Leary, 943 F.2d 711, 720 (7th Cir. 1991); 28 U.S.C. § 2254. Thus, violations of state evidentiary rules may not be questioned in federal habeas proceedings unless "they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." Escobar, 943 F.2d at 720 quoting Searcy v. Greer, 768 F.2d 906, 910 (7th Cir.), cert. denied, 474 U.S. 996, 88 L. Ed. 2d 363, [**90] 106 S. Ct. 412 (1985). Because there is no federal constitutional requirement that the state provide a means of post-conviction review, Williams v. State of Missouri, 640 F.2d 140, 143 (8th Cir.), cert. denied, 451 U.S. 990, 68 L. Ed. 2d 849, 101 S. Ct. 2328 (1981), the alleged deficiencies in the instant case must be analyzed under the standard set forth in Escobar.

Under this strict standard, none of Petitioner's alleged violations rises to the level of a federal constitutional violation. Under Illinois law, the appointment of an expert on capital defense or mitigation in sentencing is within the discretion of the trial judge. People v. Mack, 128 Ill. 2d 231, 250, 538 N.E.2d 1107, 131 Ill. Dec. 551 (1989), cert. denied, 493 U.S. 1093, 107 L. Ed. 2d 1072, 110 S. Ct. 1170 (1990). The threshold requirement for the admission of expert testimony is that the proffered testimony be of assistance to the trier of fact. Id. Here, Judge Caisley found that neither of the two experts proffered by Petitioner would be helpful in his decision regarding the effectiveness of Hall's trial counsel. The Illinois Supreme Court found that the judge had not abused his discretion in making this finding. Hall [**91] II, 626 N.E.2d at 138.

This Court finds that Judge Caisley reasonably exercised his discretion to exclude the testimony of Hall's two proffered experts. As noted above, Ahlemeyer and Skelton were not constitutionally ineffective for their failure to present a mitigation expert at the original sentencing because at that time, such experts were not frequently used. Thus, introduction of such an expert at the post-conviction hearing would only have introduced the sort of hindsight review prohibited by Strickland. 466 U.S. at 689.

Moreover, Judge Caisley was justified in excluding the expert on the defense of capital cases because Hall's attorneys need not have rendered "expert" assistance at his sentencing, only assistance which was "reasonably effective." Id. at 687; see also Waters, 46 F.3d at 1518 ("Nor is the test whether the best criminal defense attorneys could have done more.); Albanese v. McGinnis,

823 F. Supp. 521, 535 (N.D. Ill. 1993), aff'd, 19 F.3d 21 (7th Cir. 1994), cert. denied, 130 L. Ed. 2d 1078, 115 S. Ct. 1114 (1995) (holding that a consultation with an attorney experienced in capital cases "is by no means constitutionally mandated"). Thus, presenting evidence [**92] on how an expert would have handled a capital case only second-guesses the competence of Petitioner's counsel under an erroneously strict standard. See United States ex rel. Eddmonds v. Peters, 1995 U.S. Dist. LEXIS 3287, 1995 WL 117901, at *28 (N.D. Ill. 1995) (holding that judge's exclusion of two expert witnesses on state post-conviction review did not deprive defendant of a full and fair hearing).

Simply because some courts have allowed such experts to testify about the prevailing professional norms in death penalty cases does not mean that the denial of such an expert's testimony is a federal constitutional violation. In any event, Ahlemeyer testified that he had read an "immense amount of information" from the Appellate Defender's office on trying death penalty cases in order to prepare for Hall's case. Thus, his minimal competence in this area cannot be questioned.

Similarly, the Court finds that Judge Caisley reasonably exercised his discretion in not recusing himself from the post-conviction proceedings. The Illinois Post-Conviction Hearing Act provides that the "proceeding shall be commenced by filing [a petition] with the clerk of the court in which the conviction took place." 725 ILCS [**93] 5/122-1 (emphasis [*1443] added). This rule exists because the original trial judge is more aware of the relevant facts of the case than any other judge would be; thus, judicial economy is served by having such post-conviction review before the same judge. The Court has

already determined in Part IV above that in the absence of actual bias, no constitutional violation occurred when Judge Caisley refused to recuse himself from the original trial or sentencing. Likewise, because the record reveals no actual bias by Judge Caisley in the state post-conviction proceeding, the Court finds no constitutional violation.

Petitioner contends that a new evidentiary hearing on Grounds I, II, and IV of his Amended Petition is "mandatory" under Townsend v. Sain, 372 U.S. 293, 313, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963), overruled on other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1, 118 L. Ed. 2d 318, 112 S. Ct. 1715 (1992), which provides:

> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances. If . . . (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the [**94] state court was not adequate to afford a full and fair hearing . . . or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

See also 28 U.S.C. § 2254(d)(2), (6)&(8).

However, the Court finds that none of these exceptions applies here. The factual determination of the state court on post-conviction review concerning Petitioner's ineffective assistance of counsel claim (Ground II) is fairly supported by the record as a whole and, for the reasons noted above, the fact-finding procedure was adequate to afford Hall a full and fair hearing. Petitioner's first ground that Judge Caisley failed to understand the law when he sentenced Hall to death needs no further factual development, as explained in Part I and footnote

4 above. Finally, there is no factual basis for Petitioner's fourth ground claim that Judge Caisley should have recused himself from the original trial, as discussed in Part IV and footnotes 5 and 14 above.

The other cases cited by Petitioner are inapposite as well because they involve situations in which the defendant was not afforded any hearing at all. See Siripongs v. Calderon, 35 F.2d 1308, 1311 [**95] (9th Cir. 1994), cert. denied, 130 L. Ed. 2d 1127, 115 S. Ct. 1175 (1995); Blackmon v. Scott, 22 F.3d 560, 567 (5th Cir.), cert. denied, 130 L. Ed. 2d 604, 115 S. Ct. 671 (1994). Here, there was an evidentiary hearing held in the state court. Although certain evidence was excluded at the discretion of the trial judge, the Court finds that no federal constitutional violation has occurred. See Escobar, 943 F.2d at 720. Thus, Hall received a full and fair hearing on post-conviction review and need not receive another one in this Court.[18]

VII. Illinois Death Penalty Act

Petitioner makes various claims regarding the unconstitutionality of the Illinois Death Penalty Statute, 720 ILCS 5/9-1, on its face and [**96] as applied. However, as Petitioner readily admits, the Seventh Circuit Court of Appeals has already rejected these arguments. Because this Court is bound by Seventh Circuit precedent, Petitioner's claims must be denied. However, for the sake

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[18] The Court also denies Petitioner's request to grant a discretionary hearing on his first five claims. The Court believes that the record evidence at Hall's trial and post-conviction hearing provides ample information to reach a decision on the merits of his claims.

of completeness, the Court will explain the reasons for its decision.

First, Petitioner claims that the statute is unconstitutional on its face "because it fails to guard against discriminatory, arbitrary and capricious exercise of prosecutorial discretion in determining which defendants shall be subjected to a death penalty hearing." This argument is closely related to Petitioner's argument that the statute "unconstitutionally vests a judicial function in the prosecution," and the Court will consider them together.

Both of these contentions were squarely rejected by the Seventh Circuit in Silagy v. Peters, 905 F.2d 986, 993 n.5 (7th Cir. 1990), [*1444] cert. denied, 498 U.S. 1110, 112 L. Ed. 2d 1106, 111 S. Ct. 1024 (1991), which held that "a prosecutor's post-conviction exercise of discretion under the Illinois statute does not amount to a 'judicial function.'" The court reasoned that, "[a] prosecutor's decision under § 9-1(d) of the Illinois [**97] statute to commence or forego a death sentence hearing is not a decision to 'impose' the death sentence. Rather, the prosecutor's role is limited to that of initiating the proceedings." Id. at 993. On the contrary, "the imposition of the sentence is left to the judge or jury after careful consideration of the aggravating and mitigating circumstances surrounding the crime and the individual defendant." Id. at 993 n.5 (emphasis added). Thus, the Seventh Circuit concluded that the prosecutor's discretion under the statute simply did not fall within the category of "sentencing discretion" that has served as the focus of the Supreme Court's concern in this area. Id. at 993. In light of this holding, the Court finds that the ability of the prosecution to initiate a death penalty

hearing is simply not enough to implicate constitutional protections. Thus, Petitioner's facial attacks on the statute in this regard must be denied.

Likewise, Petitioner's claim that the statute is unconstitutional "because it is applied in an arbitrary, capricious and discriminatory manner" is foreclosed by the Seventh Circuit's holding in Davis v. Greer, 13 F.3d 1134, 1144 (7th Cir. 1994): [**98]

> We consider Davis' assertion that prosecutors in other murder cases did not seek the death penalty and that doing so in this case (and not others) is arbitrary and capricious. Again, McCleskey [v. Kemp, 481 U.S. 279, 306-07, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987)] is dispositive. The Court considered the same argument there and concluded that the defendant could not prove a constitutional violation by demonstrating that other defendants who might have been similarly situated did not receive the death penalty.

Moreover, the Seventh Circuit in Williams v. Chrans, 945 F.2d 926, 936 (7th Cir. 1991), cert. denied, 505 U.S. 1208, 120 L. Ed. 2d 877, 112 S. Ct. 3002 (1992) quoting Silagy, 905 F.2d at 998, held: "Because the statute provides 'for a certain result based on the balance struck by the jury between the aggravating and mitigating circumstances,' . . . the statute [does] not impose the death penalty in an arbitrary or capricious manner."

Petitioner also argues that the statute "is unconstitutional on its face because it fails to limit the nonstatutory aggravating factors which may be considered by the sentencing authority." This argument [**99] is precluded by the Seventh Circuit's holding in Silagy that the statute limits those nonaggravating factors to only those

which are "relevant to the imposition of the death penalty." 905 F.2d at 1000 quoting 720 ILCS 5/9-1(c). Thus, the Seventh Circuit found that because the sentencing authority's "discretion is guided in a constitutionally adequate way . . . and is not so wholly arbitrary as to offend the Constitution, the eighth amendment cannot and should not demand more." Id. at 1000-01 quoting Barclay v. Florida, 463 U.S. 939, 951-52, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983).

Next, Petitioner argues that the statute "is unconstitutional on its face because it fails to require written findings with regard to nonstatutory aggravating factors that would allow meaningful review and ensure that improper factors were not considered at sentencing." Although it appears that the Seventh Circuit has not addressed this exact issue, the Court finds that it is without merit. Because the Seventh Circuit has found that the statute imposes sufficient constraints on the sentencing authority's consideration of nonstatutory aggravating factors, id., written findings by [**100] the jury are not constitutionally required in order to determine whether the death penalty was imposed in an arbitrary or capricious manner. Moreover, trial judges are presumed to know the law and to apply it in making their decisions. Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990); Miller, 800 F.2d at 136. See also Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir.), cert. denied, 126 L. Ed. 2d 220, 114 S. Ct. 269 (1993) ("Courts invoke a 'presumption' that jurors understand and follow their instructions."). In the face of such a presumption, [*1445] there is no constitutional requirement that written findings be made.

Petitioner also maintains that the statute "is unconstitutional because it shifts to the defendant the burden of proving that a sentence other than death is appropriate or at least it is unclear who bears the burden of proof." This argument is precluded by the Seventh Circuit's holding in Silagy:

> We agree with the Illinois Supreme Court that where a defendant attempts to persuade the jury that the death penalty is inappropriate in his case, "a burden of persuasion is placed on the defendant by the sentencing statute. . ." However, [**101] we also agree with the Illinois Supreme Court that the imposition of such a burden of persuasion on a defendant "is constitutional because at this point in the hearing the prosecution has already proven beyond a reasonable doubt that a statutory aggravating factor exists making the defendant eligible for the death penalty, and the jury is now weighing aggravating and mitigating factors presented by both the State and defendant." As the Illinois Supreme Court noted, this kind of capital sentencing procedure which specifies a class of murderers who are eligible for the death penalty and provides for consideration of mitigating factors unique to the offense and offender has been approved by the Supreme Court in Jurek v. Texas, 428 U.S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976); see also Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) ("So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating [**102] circumstances sufficiently substantial to call for leniency.").

Id. at 998-99 (internal citations omitted). See also Davis, 13 F.3d at 1143.

Petitioner further contends that the statute "unconstitutionally fails to require a determination that death is the appropriate penalty." First, the Court notes that Petitioner has procedurally defaulted this claim by not presenting it to the Illinois Supreme Court on direct or post-conviction review of his death sentence. See Jones, 15 F.3d at 675; Reese, 926 F.2d at 671.

However, this claim would also be rejected on its merits because of the Seventh Circuit's holding in Silagy that "a sentence of death is imposed in Illinois only after the sentencing authority determines that the aggravating circumstances outweigh the mitigating circumstances in the particular crime committed by the particular defendant." 905 F.2d at 1000. Thus, relying upon the U.S. Supreme Court's decision in Blystone v. Pennsylvania, 494 U.S. 299, 305, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990), the Seventh Circuit found that the Illinois Death Penalty Statute does require "an individualized determination of the appropriateness of a death [**103] sentence" and is constitutional. Silagy, 905 F.2d at 999-1000. See also Chrans, 945 F.2d at 935-36 (relying upon Silagy and Blystone to arrive at the same conclusion).

Petitioner's next ground is that the statute is unconstitutional because it "fails to provide adequate notice that the State will seek the death penalty." Once again, this claim has been procedurally defaulted because it was not presented to the state courts. Moreover, the merits of this claim were rejected by the Seventh Circuit in Silagy which held that neither the Sixth nor Fourteenth Amendment requires pretrial notice to a defendant that

the State will be seeking the death penalty. 905 F.2d at 994-97.

Petitioner also asserts that "the determination by a majority of the Illinois Supreme Court that the Death Penalty Statute is unconstitutional renders the statute and Hall's execution unconstitutional." This claim is likewise procedurally defaulted for failure to present it to the state courts. The merits of this claim have also been rejected by the district court in Albanese which reasoned that two of the Illinois Supreme Court Justices who comprise this supposed "majority [*1446]" later filed special [**104] concurrences clarifying that they no longer adhere to that view. 823 F. Supp. at 559. See People v. Albanese, 104 Ill. 2d 504, 473 N.E.2d 1246, 1263-70, 85 Ill. Dec. 441 (1984), cert. denied, 471 U.S. 1044, 85 L. Ed. 2d 335, 105 S. Ct. 2061 (1985). The Court adopts the same reasoning here.

Lastly, Petitioner asserts that "the cumulative effect of its defects renders the Illinois Death Penalty Statute unconstitutional." In addition to this claim being procedurally defaulted, the Court agrees with the Illinois Supreme Court's holding in People v. Ramey, 151 Ill. 2d 498, 603 N.E.2d 519, 546, 177 Ill. Dec. 449 (1992), cert. denied, 508 U.S. 941, 124 L. Ed. 2d 641, 113 S. Ct. 2419 (1993):

> While this court is cognizant of that old adage that the whole is greater than the sum of its parts, we fail to see how such an adage could be of assistance in such a case as this. If all of the individual aspects are constitutional, we stand by the conclusion that the whole is also constitutional.

See also Smith v. Cook County, 74 F.3d 829, 1996 U.S. App. LEXIS 1109, *15, 1996 WL 29447, at *5 (7th Cir.

Jan. 26, 1996) ("Adding together a string of nothings still yields nothing."). Thus, the Court finds that all of Petitioner's attacks on the Illinois Death Penalty Statute are [**105] without merit.

CONCLUSION

IT IS THEREFORE ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is DENIED. The Clerk is ordered to TERMINATE this case.

ENTERED this 22nd day of February, 1996.

JOE BILLY McDADE

United States District Judge

APPENDIX C

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee, v. ANTHONY HALL, Appellant.

Docket No. 71751

SUPREME COURT OF ILLINOIS

157 Ill. 2d 324; 626 N.E.2d 131;
1993 Ill. LEXIS 78; 193 Ill. Dec. 98

September 23, 1993, Filed

SUBSEQUENT HISTORY: [***1]

Petition for Rehearing Denied January 31, 1994.

PRIOR HISTORY: Appeal from the Circuit Court of Livingston County, the Hon. William T. Caisley, Judge, presiding.

DISPOSITION: Affirmed.

COUNSEL: Marc R. Kadish, of Chicago (William Beattie, Jordan Cramer, John Lavey, Martha Niles, Patrick Blegen, Ellen Grigorian and Pamela Wolf, law students), for appellant.

Roland W. Burris, Attorney General, of Springfield (Rosalyn B. Kaplan, Solicitor General, and Terence M. Madsen and Bradley P. Halloran, Assistant Attorneys General, of Chicago, of counsel), for the People.

JUDGES: FREEMAN

OPINION BY: FREEMAN

OPINION: [*329] [**133] JUSTICE FREEMAN delivered the opinion of the court:

Defendant, Anthony Hall, petitioned the circuit court of McLean County for post-conviction relief pursuant to the Post-Conviction Hearing Act (Ill. Rev. Stat. 1989, ch. 38, par. 122-1 et seq.). The trial judge denied the petition, [*330] and defendant appeals to this court (134 Ill. 2d R. 651(a)). We affirm.

BACKGROUND

We described the circumstances of the crime in the direct appeal and will not repeat them here. Following a bench trial, defendant was convicted of murder and was sentenced to death. This court affirmed defendant's conviction and sentence on direct appeal, and the United States Supreme Court denied certiorari. People v. Hall (1986), 114 Ill. 2d 376, 499 N.E.2d 1335, 102 Ill. Dec. 322, cert. denied (1987), 480 U.S. 951, 94 L. Ed. 2d 802, 107 S. Ct. 1618.

The record shows that on October 5, 1989, defendant filed his second-amended petition for post-conviction [***2] relief. Defendant claimed, inter alia, that he was denied his right to the effective assistance of counsel.

In related motions, defendant moved that the trial judge: appoint a mitigation expert and an expert witness; recuse himself and transfer the petition to another circuit court; and allow defendant to depose his appointed trial counsel, Livingston County Public Defender David Ahlemeyer and McLean County Public Defender Steven Skelton. The trial judge denied these motions.

On January 5 and April 27, 1990, the trial judge held an evidentiary hearing on defendant's post-conviction petition. In a memorandum order dated March 6, 1991, the trial judge denied the petition.

OPINION

A proceeding brought under the Post-Conviction Hearing Act (Act) (Ill. Rev. Stat. 1989, ch. 38, par. 122-1 et seq.) is not an appeal; rather, it is a collateral attack on a judgment of conviction. The purpose of the proceeding is to resolve allegations that constitutional violations occurred at trial, when those allegations have not been, and could not have been, adjudicated previously (People [*331] v. Eddmonds (1991), 143 Ill. 2d 501, 510, 578 N.E. 2d 952, 161 Ill. Dec. 306.) The petitioner carries the burden to establish [***3] a substantial deprivation of constitutional rights. This court will not disturb the trial court's determinations absent manifest error. People v. Griffin (1985), 109 Ill. 2d 293, 303, 487 N.E.2d 599, 93 Ill. Dec. 774.

On appeal, defendant contends that he was denied his constitutional rights (U.S. Const., amends. VI, VIII, XIV) because: (1) the trial judge refused to recuse himself from the post-conviction proceeding; (2) his trial counsel failed to provide effective assistance during the death sentencing hearing; (3) the trial judge refused to appoint an expert witness and a mitigation expert, and subsequently did not allow that expert witness to testify at the post-conviction hearing; and (4) disallowed defendant from deposing Ahlemeyer and Skelton.

Recusal From Post-Conviction Proceeding

Defendant first contends that the trial judge should have recused himself from the post-conviction proceeding. There is no absolute right to a substitution of judge at a post-conviction proceeding. (People v. House (1990), 202 Ill. App. 3d 893, 910, 560 N.E.2d 1224, 148 Ill. Dec.

627, citing People v. Wilson (1967), 37 Ill. 2d 617, 230 N.E.2d 194.) Rather, the same judge who presided over the [***4] defendant's trial should hear his post-conviction petition, unless it is shown that the defendant would be substantially prejudiced. People v. Mamolella (1969), 42 Ill. 2d 69, 73, 245 N.E.2d 485; People v. Neal (1984), 123 Ill. App. 3d 148, 152, 462 N.E.2d 814, 78 Ill. Dec. 695; see People v. Day (1987), 152 Ill. App. 3d 416, 421, 504 N.E.2d 979, 105 Ill. Dec. 694.

[**134] In the present case, the trial judge appointed defendant's choice of defense counsel for the post-conviction proceeding. In the motion to recuse and at the hearing on the motion, defendant's post-conviction counsel conceded that he had no evidence that the judge was biased or unfair. Indeed, counsel noted that his appointment was a sign of the trial judge's fairness. Counsel stated that he filed the recusal motion only to preserve the is [*332] sue for possible, future litigation. Counsel did not offer any facts showing that the trial judge was actually prejudiced against him.

Before this court, defendant concedes his lack of evidence of the trial judge's bias or unfairness. However, defendant contends that, as a matter of due process, "a judge must not only recuse himself or herself from a case where actual prejudice does exist, [***5] but also where his or her hearing the case would give the appearance of partiality."

Of course, a basic requirement of due process is a fair trial in a fair tribunal, and fairness requires an absence of actual bias in the trial of the case. But further, our legal system has always sought to prevent even the probability of unfairness. As a result, due process may sometimes require a trial judge who has no actual bias

to recuse himself or herself from a case where that judge's hearing the case would create the appearance of partiality. In re Murchison (1955), 349 U.S. 133, 136, 99 L. Ed. 942, 946, 75 S. Ct. 623, 625.

Defendant points to several circumstances which, he contends give the appearance of partiality to the trial judge hearing the post-conviction petition. These circumstances surround a single event. Immediately prior to opening statements in defendant's trial, defendant requested to proceed pro se and asked for a continuance to prepare his defense. The trial judge brought defendant, defense counsel, and a court reporter into a conference room adjoining the courtroom and outside of the presence of the jury. The [***6] trial judge, defense counsel, and defendant were discussing defendant's representation when defendant struck his appointed trial counsel, McLean County Public Defender Steven Skelton, on the head with a chair and struck the trial judge on the head with his fist. Hall, 114 Ill. 2d at 389-90.

[*333] In Wilks v. Israel (7th Cir. 1980), 627 F.2d 32, the United States Court of Appeals for the Seventh Circuit was presented with the same issue with similar facts. The court concluded as follows:

> "A petitioner's deliberate attack on the trial judge calculated to disrupt the proceedings will not force a judge out of a case. Mayberry v. Pennsylvania, 400 U.S. 455, 463, 91 S. Ct. 499, 504, 27 L. Ed. 2d 532 (1971). To permit such an attack to cause a new trial before a new judge would encourage unruly courtroom behavior and attacks on the trial judge and would greatly disrupt judicial administration." Wilks, 627 F.2d at 37.

Accord 48A C.J.S. Judges § 110, at 739 (1981).

This conclusion accords with the basic policy that we explained in the direct appeal: [***7]

> "We cannot presume a failure of impartiality of a trial judge even under extreme provocation. Judges are called upon to preside over the trial of onerous causes and persons. By definition, however, a trial judge is required to ignore provocations and pressures, whether public or from individuals. * * * To hold that the law requires a substitution of judges under circumstances similar or comparable to those here would invite misconduct toward judges and lawyers, and a practice would develop that the grosser the misconduct the better the chances to avoid trial wit. an undesired judge or lawyer." Hall, 114 Ill. 2d at 407.

When presented with such facts, rather than adopt a per se rule, a reviewing court should "examine the trial to ensure that the trial judge, despite good cause for adverse feelings toward a defendant, has conducted a fair trial." (Wilks, 627 F.2d at 37 n.6.) We now address defendant's contentions [**135] in terms of whether the trial judge conducted a fair post-conviction proceeding.

Defendant first contends that the fact of the attack, alone, gives the appearance of partiality to the trial judge hearing the [***8] post-conviction petition. We disagree. [*334] In the first appeal, we rejected defendant's contention that, based on the attack, the trial judge should have recused himself from the trial. We held that the judge's conduct at trial was entirely proper. (Hall, 114 Ill. 2d at 405-07.) That holding is res judicata, and the issue cannot be relitigated by recharacterizing it. (People v. Spreitzer (1991), 143 Ill. 2d 210, 223-24, 572 N.E.2d 931, 157 Ill. Dec. 467 (and cases cited therein).) Defendant admittedly does not have any additional facts

to support a claim of partiality in the context of the post-conviction petition. Thus, we cannot say that the trial judge should have recused himself on this basis.

Defendant next contends that the trial judge should not have heard the post-conviction petition because the trial judge sentenced defendant to death. Defendant notes that the trial judge, in denying the recusal motion, remarked that he was "uncomfortable" with the death penalty. Defendant further notes that it was in his case that the trial judge imposed a death sentence for the first time in his judicial career. Thus, defendant reasons, the trial judge's violent [***9] encounter with defendant, in addition to the fact that the judge sentenced defendant to death, give the appearance of partiality to the trial judge hearing the post-conviction petition.

We disagree. The trial judge ordinarily is in the best position to determine whether he or she has been prejudiced against the defendant. (Hall, 114 Ill. 2d at 406, citing People v. Vance (1979), 76 Ill. 2d 171, 178, 390 N.E.2d 867, 28 Ill. Dec. 508.) Also, "ordinarily the fact that a judge has ruled adversely to a defendant in either a civil or a criminal case does not disqualify that judge from sitting in subsequent civil or criminal cases in which the same person is a party" Vance, 76 Ill. 2d at 178.

In the present case, the judge's remarks, to which defendant refers, were as follows:

> "THE COURT: Well, as far as I personally am concerned with this case, I do feel very uncomfortable with [*335] this case. But not uncomfortable because I don't think I can be fair, but I am just uncomfortable with the death penalty itself. And I don't suppose that it was designed to make trial judges com-

> fortable. So I do believe that I can be fair. I think I have demonstrated [***10] my ability to be fair to Mr. Hall before. And I certainly don't intend to depart from that at this stage. So I am going to deny the motion."

The trial judge determined that he could be fair, and the fact that the judge previously sentenced defendant to death did not disqualify him from hearing defendant's post-conviction petition. After reviewing the entire post-conviction proceeding, we cannot say that the trial judge should have recused himself on this basis.

Defendant next contends that the trial judge should not have heard the post-conviction petition because he ultimately denied the petition. Defendant argues that the denial showed the trial judge's inability to remain impartial. We disagree. "The entry of an adverse judgment, standing alone, is not evidence of prejudice." (Nehring v. First National Bank (1986), 143 Ill. App. 3d 791, 805, 493 N.E.2d 1119, 98 Ill. Dec. 98.) We cannot say that the trial judge should have recused himself on this basis.

Defendant also contends that the trial judge should not have heard the post-conviction petition because the judge was a potential witness against defendant regarding the attack. Defendant lastly contends that the trial judge should not [***11] have heard the post-conviction petition because the judge, as chief judge of the McLean County circuit court, assigned the petition to himself. Defendant argues that another judge should have determined whether the trial judge could hear the petition impartially. We disagree. Again, the trial judge [**136] was in the best position to determine whether he could hear the petition impartially (see Vance, 76 Ill. 2d at 178), and the post-conviction record does not show that

he failed to do so. [*336] We cannot say that the trial judge should have recused himself on these bases.

After carefully reviewing the record, we conclude that defendant received a fair hearing on his post-conviction petition. Of course, "an attack [against a judge by a party] may be sufficiently vicious to compel a presumption that the judge was affected." (46 Am. Jur. 2d Judges § 171 (1969).) In such a case, it would be better if the trial judge recused himself or herself. (See, e.g., Annot., 25 A.L.R.4th 923, 926-27 (1983).) However, based on the trial judge's explicit determination that he could be impartial, and on the particular facts of this case, we cannot say that [***12] the trial judge's denial of defendant's recusal motion was manifestly erroneous.

Ineffective Assistance of Counsel

Defendant next contends that his trial counsel failed to provide effective assistance during the death sentence hearing, as guaranteed by the sixth and fourteenth amendments to the United States Constitution. (U.S. Const., amends. VI, XIV.) Defendant claims that his trial counsel failed to present, or even investigate, meaningful mitigation evidence.

The State initially responds that defendant has waived this issue in this post-conviction appeal by failing to raise it on direct appeal. It is true that where a post-conviction petitioner has previously taken a direct appeal from a judgment of conviction, issues that could have been presented on direct appeal but were not are deemed waived. People v. Flores (1992), 153 Ill. 2d 264, 274, 606 N.E.2d 1078, 180 Ill. Dec. 1; People v. James (1970), 46 Ill. 2d 71, 74, 263 N.E.2d 5.

However, defendant's post-conviction claim relies on affidavits of several alleged mitigating witnesses. Those affidavits were not part of the record on direct appeal. Thus, defendant could not have raised the issue in his direct appeal. Accordingly, [***13] the issue is not waived in a [*337] post-conviction proceeding. [**137] Eddmonds, 143 Ill. 2d at 528; People v. Owens (1989), 129 Ill. 2d 303, 308-09, 544 N.E.2d 276, 135 Ill. Dec. 780.

At the hearing on his post-conviction petition, defendant presented the live testimony of Father Richard Means and Leta Powell, and affidavits from six others. Each swore that he or she would have testified at defendant's death sentencing hearing had that person been contacted by defendant's trial counsel. Defendant also testified that he gave his trial counsel a list of possible witnesses.

To establish a claim of ineffective assistance of counsel, a defendant must satisfy a two-pronged test. (See Strickland v. Washington (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, adopted in People v. Albanese (1984), 104 Ill. 2d 504, 473 N.E.2d 1246, 85 Ill. Dec. 441.) First, the defendant must prove that counsel's representation fell below an objective standard of competence. Second, the defendant must prove that, but for counsel's unprofessional errors, the result would have been different. (People v. Hampton (1992), 149 Ill. 2d 71, 108, 594 N.E.2d 291, 171 Ill. Dec. 439.) [***14] In the context of a death sentencing hearing, the defendant must prove that there is a reasonable probability that, absent counsel's deficient conduct, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Hampton, 149 Ill. 2d at 109; Eddmonds, 143 Ill. 2d at 534-35.

A defendant must satisfy both prongs of the Strickland test to prevail on a claim of ineffective assistance of counsel. However, it is settled that if the ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer sufficient prejudice, a court need not decide whether counsel's performance was constitutionally deficient. Flores, 153 Ill. 2d at 283-84; Eddmonds, 143 Ill. 2d at 511-12.

Applying these principles to the present case, we conclude that defendant has failed to show that his trial [*338] counsel was ineffective under the sixth amendment. At defendant's death sentencing hearing, the aggravating evidence included certified copies of defendant's earlier convictions for rape, armed violence, and [***15] two armed robberies; and the testimony of two of defendant's past victims. (Hall, 114 Ill. 2d at 401.) The State also presented evidence that defendant, while in prison, held an inmate while two other inmates stabbed him. The trial judge heard mitigating evidence from defendant himself and two others. Hall, 114 Ill. 2d at 401.

The trial judge, in his order denying defendant's post-conviction petition, described the mitigating testimony presented at the death sentencing hearing as background and character evidence. The judge considered the mitigating evidence presented at the post-conviction hearing to have been essentially cumulative. The trial judge found that had defendant's post-conviction witnesses and affiants testified at the sentencing hearing, there was no reasonable probability that the sentence would have been different. After carefully reviewing the record, we cannot say that this finding was manifestly erroneous.

We note defendant's argument that the trial judge ignored some of the post-conviction witnesses and affiants. In his memorandum order, the trial judge specifically referred to approximately half of [***16] defendant's post-conviction witnesses and affiants; the judge did not recite the testimony of each seriatim. However, all of the evidence was presented to the trial judge. Absent an indication to the contrary, we presume that the trial judge considered all of the evidence in denying the petition. The fact that the trial judge chose to address only certain evidentiary items does not mean that the judge failed to consider all of the evidence presented. (See People v. Summers (1977), 50 Ill. App. 3d 33, 35, 365 N.E.2d 241, 8 Ill. Dec. 3.) We uphold the trial judge's conclusion that defendant failed to establish a [*339] claim of ineffective assistance of counsel under the sixth amendment.

Expert Testimony

The trial judge denied defendant's motion to appoint attorney Michael Metnick as an expert witness. Defendant alleged that Metnick's testimony would: (1) establish the appropriate standard of competence necessary for effective assistance of counsel at a death sentencing hearing, and (2) show that Ahlemeyer and Skelton performed below that standard. The trial judge also denied defendant's subsequent motion to allow Metnick to testify at the hearing on the post-conviction petition.

The trial [***17] judge also denied defendant's motion to appoint Mary DeSloover as a mitigation expert. Defendant alleged that DeSloover would present mitigating evidence regarding defendant's sentence, which the trial

judge could compare to that presented by Ahlemeyer and Skelton. Defendant alleged that this comparison would show that Ahlemeyer and Skelton performed below the appropriate standard of competence.

On appeal, defendant contends that the trial judge should have appointed Metnick and DeSloover as experts, or at least should have allowed Metnick to testify at the post-conviction hearing. Defendant argues that the denial of these experts effectively denied him his constitutional rights to effective assistance of counsel, and to offer mitigating evidence at his death sentencing hearing. U.S. Const., amends. VI, VIII, XIV.

This court has stated the following controlling principle:

> "Whether to allow the appointment of an expert, and to permit introduction of his testimony, are questions committed to the discretion of the trial judge. A threshold requirement for the admission of expert testimony is that the proffered testimony be of assistance to the court [*340] or jury." People v. Mack (1989), 128 Ill. 2d 231, 250, 538 N.E.2d [**138] 1107, 131 Ill. Dec. 551, [***18] cited in Eddmonds, 143 Ill. 2d at 536.

In the present case, the trial judge concluded that the proffered testimony would not help him to determine whether Ahlemeyer and Skelton performed below the required standard of competence. We agree. Defendant has failed to prove that, even had Ahlemeyer and Skelton presented at the sentencing hearing all of the mitigating evidence that Metnick and DeSloover would have presented, there was a reasonable probability that the sentence would have been different. Thus, we cannot say that the trial judge abused his discretion in refusing to admit this expert testimony.

Discovery Depositions

Defendant lastly contends that the trial judge should have allowed defendant to depose Ahlemeyer and Skelton. It is settled that the taking of a discovery deposition is neither authorized nor prohibited by the Act. Rather, it is a matter within the trial judge's inherent authority. In deciding whether to permit the taking of a discovery deposition, the trial judge should consider all the relevant circumstances, including the issues presented in the post-conviction petition and the availability of the desired evidence through other sources. [***19] (People ex rel. Daley v. Fitzgerald (1988), 123 Ill. 2d 175, 183-84, 526 N.E.2d 131, 121 Ill. Dec. 937.) The trial judge's decision should not be reversed absent an abuse of discretion. Fitzgerald, 123 Ill. 2d at 180, quoting People v. Rose (1971), 48 Ill. 2d 300, 302, 268 N.E.2d 700.

In the present case, the evidence that defendant desired through discovery depositions was made available through another source. In his post-conviction petition, defendant claimed that Ahlemeyer and Skelton failed to provide effective assistance of counsel. At the hearing on the petition, Ahlemeyer and Skelton were extensively examined and cross-examined regarding defendant's allegations. [*341] We cannot say that the trial judge abused his discretion in denying defendant's motion to depose Ahlemeyer and Skelton.

For the foregoing reasons, the order of the circuit court of McLean County is affirmed. The clerk of this court is directed to enter an order setting Wednesday, January 19, 1994, as the date on which the sentence of death entered in the circuit court is to be imposed. The defendant shall be executed in the manner provided by law.

(Ill. Rev. Stat. 1991, ch. 38, [***20] par. 119-5.) The clerk of this court shall send a certified copy of the mandate in this case to the Director of Corrections, the warden of Stateville Correctional Center, and the warden of the institution where defendant is now confined.

Affirmed.

APPENDIX D

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee, v. ANTHONY HALL, Appellant

No. 60167

Supreme Court of Illinois

114 Ill. 2d 376; 499 N.E.2d 1335; 102 Ill. Dec. 322

October 17, 1986, Filed

SUBSEQUENT HISTORY: Rehearing Denied December 1, 1986.

PRIOR HISTORY:

Appeal from the Circuit Court of McLean County, the Hon. William T. Caisley, Judge, presiding.

DISPOSITION: Judgment affirmed.

COUNSEL: Charles M. Schiedel, Deputy Defender, and James E. Chadd, Assistant Defender, of the Office of the State Appellate Defender, of Springfield, for appellant.

Anthony Hall, of Menard, pro se.

Neil F. Hartigan, Attorney General, of Springfield, and Donald D. Bernardi, State's Attorney, of Pontiac (Roma J. Stewart, Solicitor General, and Mark L. Rotert, Sally L. Dilgart and Scott Graham, Assistant Attorneys General, of Chicago, of counsel), for the People.

JUDGES: JUSTICE WARD delivered the opinion of the court. JUSTICE SIMON, concurring in part and dissenting in part.

OPINION BY: WARD

OPINION: [*385] [**1337] [***324] The defendant, Anthony Hall, while an inmate at the Pontiac correctional institution, was charged by indictment in the circuit court of Livingston County with the murder (Ill. Rev. Stat. 1983, ch. 38, par. 9—1) of Frieda King. Following a change of venue to McLean County, the defendant was found guilty of murder in a bench trial in the circuit court. A hearing was held on the State's motion to determine if the defendant was subject to the death penalty. The court found a statutory aggravating factor to exist, in that the victim was an employee of an institution of the Department of Corrections killed in the course of performing official duties (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(b)(2)), and the court determined there were no mitigating factors sufficient to preclude imposition of the death sentence. The defendant was sentenced to death, but the sentence was stayed pending a direct appeal to this court under section 4(b) of article VI of the Constitution of Illinois (Ill. Const. [*386] 1970, art. VI, sec. 4(b)) and Supreme Court Rule 603 (87 Ill. 2d R. 603).

At approximately 6:30 p.m. on February 8, 1983, the body of Frieda King, who worked as a civilian supervisor in the inmate kitchen at the Pontiac Correctional Center, was found in a locked closet near the cold-storage area of the kitchen facilities. The autopsy performed by Dr. Edward Shalgos revealed that King died from severe blood loss resulting from stab wounds in the upper portion of her back and chest. The victim's lungs, aorta and liver were lacerated, and at least one of the wounds was inflicted by a left-handed assailant. There was evidence of hemorrhage within the muscle tissue of her neck, suggesting to Dr. Shalgos that King had been manually strangled. There also were cuts on her hands.

The focus of the investigation into King's death turned to the defendant, who worked as a clerk in the inmate kitchen on February 8. On February 14, 1983, Livingston County State's Attorney Donald D. Bernardi filed a criminal information in the circuit court charging Hall with the murder. (The criminal information was later superseded by an indictment.) At his arraignment on February 23, the defendant requested a preliminary hearing and informed the court that he did not wish to be represented by the public defender.

At two subsequent hearings the defendant told the court that he had been unable to engage a lawyer. On March 8, the court appointed Livingston County Public Defender David Ahlemeyer. The next day, Ahlemeyer filed a jury demand and the defendant's affidavit to his indigency.

Then followed correspondence between the defendant and Judge William T. Caisley [**1338] [***325] in which the defendant expressed, without explanation, his dissatisfaction with Ahlemeyer and requested that the court appoint counsel other than the public defender. Generally, the defendant [*387] complained that he was unable to establish a "rapport" with Ahlemeyer, apparently out of fear that the public defender's ties to the community and "political concerns" would weaken his representation of the defendant. The court, in a letter responding to each of the defendant's letters, explained that the right to representation included the right to counsel of choice if the defendant was able to afford private counsel, the right to have the public defender appointed in the event he could not retain private counsel, and the right also to represent himself. The court instructed Hall that it would appoint counsel other than the public defender

only upon a showing that a conflict of interest would prevent the public defender from representing him. The court also cautioned Hall as to the seriousness of the charges against him and encouraged him to cooperate with Ahlemeyer in preparing a defense.

On May 5, the court allowed the defendant's motion for a change of venue, and the case was assigned to the circuit court of McLean County.

In a letter postmarked June 20, the defendant again complained to Judge Caisley about Ahlemeyer's representation. He wrote that the court "had the factors in front of you, conflict of interest [would be an] understatement, etc [sic]." He also supplied the names of two attorneys with whom he claimed to have been in contact and asked the court to appoint one as his counsel. The court replied that, if there was a factual basis to the defendant's contention of a conflict of interest, he should make a motion to have Ahlemeyer withdraw and the court would conduct a hearing on the motion. The prosecution was given notice of this correspondence between the court and the defendant.

On August 17, the defendant filed a "motion to discharge" the public defender. Ahlemeyer, in turn, filed a motion to withdraw. At the hearing on both motions, [*388] Ahlemeyer told the court that the defendant refused to cooperate with him and recounted an incident in June when he was at the Pontiac institution when the defendant refused to leave his cell and meet Ahlemeyer. The defendant was allowed to address the court. He stated that he personally did not dislike Ahlemeyer, but that he did not believe the public defender would act in his best interest because Ahlemeyer "was in reliance"

with the State's Attorney. Ahlemeyer assured the court that he had no animosity toward the defendant and that there was not a conflict of interest which would affect his representation. The court denied the defendant's motion to discharge the public defender, and denied Ahlemeyer's motion to withdraw.

At the same hearing, the court allowed defense counsel's request that a psychiatric examination be given Hall to determine his fitness to stand trial.

On October 4, the court conducted a hearing on the defendant's fitness to stand trial. Ahlemeyer was allowed to testify as to his representation of the defendant, stating that Hall again refused to see him and that it would be necessary for Hall to revise his behavior of noncooperation. The defendant testified that his refusal to cooperate with Ahlemeyer was not a reflection of any unfitness to stand trial, but was a "deliberate * * * rational act." He then told the court: "I am not going to cooperate with him and if he comes within an arm's length of me I will spare you the particulars. If that is what I have to do to get him off this case, I will rise to that occasion. I can only get an assault charge." The court found the defendant fit to stand trial and continued the matter until November 1.

On that day, Ahlemeyer asked that the defendant be shackled while he was in the courtroom. The court, after reading a letter addressed to the court in which the defendant substantially repeated the threat made earlier, [*389] ordered the defendant shackled. The court then heard argument on the defendant's renewed motion to discharge [**1339] [***326] Ahlemeyer. The public defender again stated that he felt able to represent the de-

fendant. The court again found that no grounds existed to release Ahlemeyer from Hall's representation, but he offered to appoint the McLean County public defender to assist Ahlemeyer at trial. The defendant refused the offer, informing the court that attorney Shelly Bannister had corresponded with him and agreed to represent him if the court would order her appointment. The court declined to appoint private counsel.

On December 5, the defendant asked the court to appoint McLean County Public Defender Steven Skelton to assist Ahlemeyer. The court granted the request. On February 21, 1984, at a hearing on the defendant's motion to suppress statements made by inmate Juan McGee, the court ordered the defendant unshackled.

Following three days of jury selection, a dispute between the defendant and his attorneys was brought to the attention of the court. The defendant wanted certain witnesses to testify at trial, but both counsel believed that their testimony would be extremely detrimental to his defense. Hall told the court that he wanted to proceed pro se. The court urged the defendant to consider the matter overnight and held the proceedings until the next day.

The following day the defendant again stated that he wished to proceed pro se and asked for a continuance to prepare his defense. The court brought the defendant, defense counsel and a court reporter into a conference room adjoining the courtroom to discuss the defendant's representation. The court advised the defendant of the unwisdom of proceeding unrepresented in a capital case. The defendant suggested that defense counsel be present and available to make objections on his behalf, but that

[*390] the defendant be allowed to examine the witnesses. Ahlemeyer objected to the proposal, pointing out that Hall's dissatisfaction with defense counsel at that point was not with their ability to examine witnesses, but rather with the decision not to call certain witnesses. Ahlemeyer contended that it would constitute incompetence to stand by and allow the defendant to introduce highly prejudicial testimony. The court asked Hall who the witnesses were that he wished to call, but before Hall could answer Ahlemeyer objected because he believed it possible that a jury trial might still be waived and that the court would then be the trier of fact. There followed an interruption in the record, after which the court stated:

> "Let the record show that the defendant has now been removed and that the prosecution is now present in chambers and that we are outside the presence of the jury and the persons assembled in the courtroom, and let the record further show that defense counsel, Steven Skelton has just been struck on the head by the defendant with a chair and that the court has also been struck by the defendant on the head with his fist and at this point, bearing in mind the previous threats that were made by the defendant at the pretrial stage against defense counsel, the court is going to order from this stage on the defendant shall be shackled at all times whether in the presence of the jury or not because it is essential for the security of the court and the officers of the court. This decision has been made only with most reluctance, but I think that with this overt act and the fact that one defense counsel and the court itself has been attacked by this defendant indicates the necessity of this step which is most reluctantly taken."

Upon returning to the courtroom, but still outside the presence of the jury, the court asked whether the defendant wished to proceed with or without counsel. The defendant refused to speak, and the judge interpreted, [*391] he said, the defendant's silence as a withdrawal of his motion to proceed pro se. Skelton and Ahlemeyer requested that the court grant their withdrawal motion, arguing that the attorney-client relationship was irretrievably lost and pointing out that the occasion may arise when they might be called to testify against the defendant in a separate proceeding arising from the battery. The court stated:

> [**1340] [***327] "I appreciate the fact that defense counsel have had more than their share of difficulty in the representation of this defendant. However, under the circumstances just minutes before the trial is to begin I don't think at this point I can in all fairness allow defense counsel to withdraw."

During the prosecution's opening statement, the defendant interrupted to inform the court that he wanted to waive a jury. The court replied that it would consider the waiver after opening statements. After the prosecution concluded and defense counsel reserved an opening statement, the jury was excused and counsel repeated the defendant's request to waive a trial by jury. The court admonished the defendant as to the charges against him, that the court would determine his guilt or innocence and the range of possible sentences if judgment were entered against him. Hall said that he understood, and the court accepted his jury waiver for the guilt phase of the trial. The defendant stated that he wanted to waive a jury throughout the proceeding, but the court explained that a waiver for the sentencing

procedure was premature and, if necessary, would be considered later. The court then summoned the jury and instructed its members that a trial by jury had been waived, but that they should not listen to or read media coverage of the trial because there was "the possibility that you may be required to determine the matter of punishment."

[*392] The State's first witness was Randall Mundschenk, the dietary manager at the prison, who stated that Frieda King's job was to supervise inmates in the preparation and serving of prison meals. He said that it was prison procedure for all inmates to be escorted out of the cold-storage area at the end of the supervisor's work shift, and that on the day of King's death the shift of the defendant's supervisor, Richard Friedman, ended at 3 p.m. Mundschenk testified that he left the institution around 4:30 in the afternoon, but that he returned around 6:20 after receiving a phone call informing him of a problem at the institution. He proceeded to the cold-storage area and was told that King was missing. Mundschenk asked that the key to the storage closet be brought to him because that room had not yet been searched. After the keys were produced Mundschenk identified the key which opened the closet door, and King's body was found in the closet.

Richard Friedman testified that he worked as a food supervisor in the cold-storage area at Pontiac from 7 a.m. to 3 p.m. on February 8, 1983. Upon conclusion of his shift, he checked the doors to the cold-storage area, hallway, bathroom and coolers to ensure that they were locked, and then handed his keys to King. He said the procedure was for a supervisor to turn over his keys to the supervisor who was to relieve him. Friedman testi-

fied that the defendant had left the area before the 3 o'clock changeover, and that he therefore did not escort Hall from the cold-storage area.

An inmate at the institution, Michael Hughes, testified that he was assigned to the scullery area of the kitchen, where he washed dishes, and that he reported to his assignment around 5:15 that day. However, instead of washing dishes, he and another inmate, Ronald Louis, began making bacon sandwiches in the kitchen area. While making the sandwiches, the witness saw the [*393] defendant emerge from the alleyway which leads to the cold-storage area. Hall had blood on the front of his shirt and blood on his left hand. The witness estimated the time to have been around 5:30. Hughes testified that the defendant picked up the kitchen phone, which prison procedure prohibited him to use and, in response to Hughes' question, Hall said that he was trying to call Lieutenant Mundschenk. The defendant also told Hughes that the blood on his shirt came from moving ground beef in the cold-storage area. Subsequent testimony established that there was no ground beef in the storage area that day.

Derrick McGee, an inmate working as an assistant cook on February 8, testified that at approximately 5:30 on that day he first saw the defendant and the victim King [**1341] [***328] talking in an office in the kitchen area and then saw them walk toward the alleyway leading to the cold-storage area. He stated that he saw no other inmates with King in that area on that day. He said that a supervisor in the upper dining room, Odette Koch, called and asked to speak to King. McGee answered that he did not know her whereabouts, despite having just seen her walk to the alleyway with Hall. On

cross-examination, he could not recall whether he saw inmates Edward Stokes and Felton Chase, who were assigned to take out the garbage in the kitchen, walk to the garbage area by way of a door near the entrance of the alleyway. He also admitted that he did not tell the investigators until January 3, 1984, that he had seen Hall and King walking toward the alleyway.

Ronald Louis, an inmate who worked as an assistant head cook, stated that he was making bacon sandwiches when he saw Hall and another inmate in the office with King. He testified that he saw the defendant and King walk toward the cold-storage area between 5:30 and 5:35. He said that he did not see anyone else go back [*394] there. The witness stated that he gave inmate Eugene Davis two bacon sandwiches because Davis was complaining about the extra dishes he had to wash after the sandwiches were made. Louis testified that he saw Davis eating the sandwiches in a sitting area near the specialdiet kitchen moments after he saw Hall and King walk toward the storage area. Louis returned to the area where he was making the sandwiches and picked up a phone that was ringing. Just then Odette Koch walked in and the witness handed her the phone. Koch asked where King was, and Louis pointed toward the cold-storage area, but he did not say that Hall was with her. On cross-examination, the witness said that he saw Hall return from the cold-storage area and have a conversation with Michael Hughes. Hall then used the phone.

Odette Koch was a food supervisor assigned to the 1 p.m. to 9 p.m. shift in the upper dining room on the day King was murdered. She testified that she telephoned the kitchen area around 5:45 p.m. because she needed some peaches, and that inmate Derrick McGee answered

the phone. She stated that McGee was unable to tell her the whereabouts of King, but McGee did tell her that there was in the kitchen a case of peaches which she could have for the upper dining room. She walked to the kitchen and encountered the defendant. The defendant, who appeared to the witness to be nervous and upset, told her that he had been cut and that he had tried unsuccessfully to get the assistance of a corrections officer. Koch and the defendant went to the door of the alleyway where Koch noticed that the door was unlocked. She became apprehensive because it was unusual for the door to be unlocked. Koch and Hall stopped at the door, and Hall showed Koch his hand, which was cut and dripping blood. At one point, the defendant ran into a bathroom adjacent to the kitchen. Koch became concerned about King, and she told a nearby inmate, whose name she [*395] could not recall, to summon a corrections officer. An officer arrived soon after. On cross-examination, the witness said that while they were standing at the door of the alleyway, she asked the defendant where King was and he indicated towards the closet door in the alley. Hall told the witness that somebody on the other side of the door was holding King.

Lieutenant David Matsko was assigned to the lower dining room on February 8, 1983. He went to the kitchen area after Officer Tim Lovell requested his assistance. He saw the defendant near the door to the cold-storage area. The defendant told him that he was looking through the window on the door when an inmate jumped out and cut him with a knife. There was, the witness stated, "blood all over" the defendant's left hand and T-shirt. The witness did not see any other inmates in the area. The defendant twice ran into the bathroom and, while he was in there, Matsko heard water running.

Matsko stated that Koch told him that King was missing and, after ascertaining King was not in the upper dining room, Matsko used his radio to call for keys to [**1342] [***329] search the storage area. He then escorted Hall to the prison hospital. On cross-examination, the witness said that he observed blood on "probably [a] quarter" of the front of Hall's shirt and blood on his pants near the pocket. He also related that while in the kitchen area he opened a locked wall safe where knives, screwdrivers, hammers and other tools were stored, and he noticed that a "scraper" was missing. The utensil was later established as the one found near King's body. He also identified a butcher knife that was discovered missing from a wall safe near the defendant's assigned desk outside Lieutenant Mundschenk's office.

David Metzger, a Department of Law Enforcement forensic scientist specializing in forensic serology, testified [*396] that he analyzed blood samples of the defendant and victim, and compared the results with his analyses of samples of blood found on the clothing each wore on February 8, and samples taken from certain areas of the inmates' kitchen. He concluded that bloodstains found on the defendant's hairnet were consistent with the victim's blood type and inconsistent with the defendant's. The same was true of bloodstains found on the defendant's lower left pants leg. Further, the witness was able to determine that the bloodstains were on the hairnet and pants "in the form of discrete droplets of flying blood and not the result of contact with an object that is already bloody as we might find in a smear or a swipe."

Blood of the type similar to that of the defendant's was found on the door handle of the bathroom, the floor of

the bathroom, on the dividing wall near the west end of the kitchen, and on the floor of the cold-storage room. The defendant's blood was also found on the front of his shirt. However, Metzger testified that he was unable to determine if the victim's blood was also on Hall's shirt because the configuration of the two blood types was such that, when mixed, the defendant's blood type could be identified but not that of the victim. The witness examined the clothing of Eugene Davis, Edward Stokes and Felton Chase, but did not find bloodstains on any of their clothing. The clothing of Henry Dancy, also examined, contained some blood, but it was determined to be not of the defendant's or victim's type.

Investigating officers testified to statements made by the defendant after King's body was found. Michael Frazier, the security chief for the Pontiac institution, said that he talked to the defendant at 7 p.m. on the night of the murder. The defendant told Frazier that he had been looking for King when he was slashed by another inmate as he was opening a door to the cold-storage area. He identified a photograph of Eugene Davis as [*397] the inmate who slashed him. Hall told Frazier that, after cutting him, Davis said that he had mistaken Hall for a food supervisor.

The next morning the defendant told Frazier that he saw King lying in a closet after Davis cut him, but before he could do anything Davis told him to run. The witness asked Hall if he knew the location of a set of missing keys, and Hall replied that, as he and Davis ran past a grease pan, the defendant heard a sound "like metal hitting metal." Frazier relayed this information to the watch commander present at the inmate kitchen and, 10

minutes later, Frazier was informed that the keys had been found in a grease pan.

Terrance Delaney, an agent with the Department of Law Enforcement, also interviewed the defendant on the day of King's death. In that interview, the defendant repeated that he had been cut by Davis when he was looking for King. The next day Delaney again talked to the defendant, and this time the witness asked Hall what his response would be if Delaney told him that his blood had been found in the oven room. Hall answered that after he had been cut and had tried unsuccessfully to get help from a corrections officer, he ran to the oven room to hide from the other inmates. Delaney testified that he asked the defendant in a later conversation to explain why the blood on his clothing matched that of the victim, and Hall replied that it only could have come from the knife [**1343] [***330] that Davis used to cut him. Delaney asked his explanation of the defendant's fingerprints found in the area where King's body was discovered, and the defendant responded that he often stacked things in the cold-storage room. Delaney then pointed out to the defendant that he had not told Hall where King's body had been found.

A short time later, Hall asked to talk with Delaney. The defendant told him that Davis cut him while he was [*398] looking for King. He told Delaney that he walked past Davis and saw King "quivering in a pool of blood" in the closet. He bent over her, but Davis told him to run. As he ran, the defendant heard the sound of metal hitting metal. When they ran into the kitchen area, Hall was confronted by inmates Stokes and Chase. Stokes told the defendant to hide in the oven room.

On March 11, 1983, Delaney was called to the defendant's cell in the north cellhouse segregation unit at Pontiac. Despite Delaney's warnings that he should not talk without his lawyer being present, Hall told Delaney that he knew what happened to King and to prove it he would tell Delaney something that no one else knew. He then told Delaney that, in addition to being stabbed, King had been choked.

Gary Neale Moore, a lieutenant at Pontiac, testified for the defense. He was with King at 5:30 p.m. on the day she was murdered. He said that he knew it was 5:30 because he was there when she answered a "security call-in" on the telephone, and that the security checks were made on the half-hour. Moore also testified that he found a 12-inch butcher knife hidden in a pan of pudding.

Corrections Officer Tim Lovell was assigned that day to guard the door leading from the kitchen area to the inmate dining room. He stated that the defendant approached him and said there was a "hit" out on the defendant, but the witness did not believe Hall. Lovell testified that later when he began looking for King, he saw Davis in the pot-and-pan area, but nowhere near the cold-storage area.

The defendant testified on his own behalf. He said that on that day other inmates had threatened to harm him. He unsuccessfully sought the aid of a corrections officer and then returned to the cold-storage area to find King because she was his friend and he knew that she [*399] would help him. Contrary to the evidence introduced by the State, Hall said that all the doors in the kitchen area were unlocked and that inmates were able to move freely

about the area. The defendant's search for King brought him to a vault room in the cold-storage area, where he found her calling in to see who was in the room. She told the defendant to go to the kitchen area and bring back a corrections officer, but the defendant refused because the inmates that were trying to harm him were in that area. She told him to use the phone to call for assistance.

At that point, inmate Eugene Davis rushed from the vault room, calling the defendant a "stool pigeon." Hall said that Davis was holding a knife, but King stepped between Davis and Hall and told Davis to put down the knife. As King came between the inmates, Davis grabbed her and stabbed her in the chest. King stumbled to the floor of the vault room as Davis continued to stab her. The defendant tried to disarm Davis, and it was then that his left hand was cut.

The defendant testified that Felton Chase and Edward Stokes, the inmates assigned to remove the garbage from the kitchen area, entered the kitchen. Stokes ordered Davis to stop stabbing King. As the defendant knelt over King, the other inmates told Davis to wash the blood off him and Davis ran to the bathroom. Davis came out of the bathroom and kicked the defendant as he was kneeling over King, then Davis slammed shut the door of the vault. Davis went back to the bathroom and returned with a mop, which he used in an attempt to clean the blood off the floor and from his shoes.

At Stokes' direction, the defendant ran to the oven area and hid. He approached Officer Lovell when he came in, but Lovell [**1344] [***331] did not help him, so Hall went into the washroom and wrapped toilet paper around his hand.

On cross-examination, the defendant claimed that he [*400] never made some of the statements which Delaney attributed to him. Hall did not tell the lieutenant the details of King's murder because he was afraid of retaliation against him and his family. He stated that he looked for King because she was his friend, but he admitted that he did not tell corrections officers who arrived at the kitchen the details of the attack on her even though he had just seen her alive on the closet floor. He acknowledged that he was left-handed.

On redirect examination, the defendant explained that the other inmates had threatened him because they had overheard him ask King if she had missed any keys after he noticed Davis in the storage area. King left to search for her keys, and inmate Chase asked the defendant what he had told her. Despite the defendant's denial, Chase stated that he knew the defendant was spying on people and that the defendant would be killed.

At the close of evidence the court found the defendant guilty of murder.

At the sentencing hearing before the court, the State introduced a copy of the defendant's birth certificate which showed that he was 24 years old on the date of the murder. The warden of Pontiac correctional institution at the time of King's murder, Kenneth McGinnis, testified that King was killed in the course of her duties at the institution.

Ron Umbdenstock, a captain at the Menard correctional institution, testified in aggravation that Hall was involved in an altercation while an inmate at Menard. Umbdenstock's testimony was that Hall held an inmate while two other inmates stabbed him, but that the victim

was only slightly injured. Umbdenstock also said that Hall and his accomplices also tried to throw the man off the prison gallery. Hall had 10 months of "statutory good time" revoked because of the incident. On cross-examination the witness admitted that the report written [*401] on the incident only charged the defendant with being involved in a fist fight.

The State introduced into evidence certified copies of the defendant's earlier convictions for rape, armed violence and two armed robberies. The State also presented the testimony of two of Hall's past victims. One testified that she was robbed and raped by Hall, and the other testified that Hall robbed and attempted to rape her.

The defendant introduced the testimony of Lloyd Shaddle, a Jehovah's Witnesses minister, who had conducted religious services for Hall while Hall was incarcerated. He said that Hall regularly attended bible study classes and that the defendant often expressed concern for his family.

The defendant testified in mitigation that his mother was 13 years old when he was born. He lived with his mother and his maternal grandparents until age 16, when he was first incarcerated. He has only been out of prison two years since his first incarceration. He married while an inmate in Pontiac, and he found the Jehovah's Witnesses faith in prison. He said that he completed work for his high school diploma by taking classes while at Menard.

Dr. Syed I. Ali, a psychiatrist at Pontiac called by defendant as a witness, testified that he saw and evaluated the defendant after the murder of King. He said that Hall was slightly above the average level of intelli-

gence, and stated that the defendant was anxious and depressed about his pending sentencing.

After argument, the court made findings on factors in aggravation and found no factors in mitigation. The court sentenced the defendant to death.

The defendant first argues that the court erred in refusing to appoint new counsel after he struck attorney Skelton on the head with a chair. He says that his complaints about his representation which culminated in the [*402] incident in the conference room were sufficient to establish a showing of "good cause," which he asserts is the statutory standard for the appointment of [**1345] [***332] counsel other than the public defender (see Ill. Rev. Stat. 1971, ch. 38, par. 113—3(b); Ill. Rev. Stat. 1971, ch. 34, par. 5604). He contends that the court erred in failing to exercise its discretion to appoint new counsel (People v. Slaughter (1980), 84 Ill. App. 3d 88; People v. Johnson (1974), 24 Ill. App. 3d 152).

The provisions of section 113—3(b) of the Code of Criminal Procedure of 1963 and section 4 of the Public Defender Act, upon which the defendant relies, assure the right to counsel to an indigent defendant and, before amendment, provided the court authority to appoint counsel other than the public defender upon a showing of good cause. (Ill. Rev. Stat. 1971, ch. 38, par. 113—3(b); Ill. Rev. Stat. 1971, ch. 34, par. 5604.) However, effective October 1, 1977, Public Act 80—846 (1977 Ill. Laws 2495-96) changed the pivotal factor in the enactments from a showing of good cause to a finding by the trial court that "the rights of the defendant will be prejudiced by the appointment of the Public Defender." (Ill. Rev. Stat. 1983, ch. 38, par. 113—3(b); Ill. Rev. Stat. 1983, ch.

34, par. 5604. (Section 4 reads "the rights of the defendant would be prejudiced * * *." (Emphasis added.))) The defendant has mistakenly relied on a decision handed down before the statutes were amended (People v. Johnson (1974), 24 Ill. App. 3d 152), and on authority decided after the statutory changes but under the superseded language (People v. Slaughter (1980), 84 Ill. App. 3d 88, 93).

The appellate court in People v. Clark (1982), 108 Ill. App. 3d 1071, held:

> "[Section 113—3(b)] clearly states that the public defender shall be appointed as counsel for an indigent defendant unless such an appointment will prejudice the [*403] rights of the defendant. Contrary to defendant's assertion, unless there is a determination that such prejudice will result, the court does not have discretion to appoint counsel other than the public defender." (108 Ill. App. 3d 1071, 1078.)

(See also People v. Johnson (1982), 109 Ill. App. 3d 511, 518; People v. Woods (1980), 84 Ill. App. 3d 938, 946.) The court in Clark contemplated the trial court's discretion only under section 113—3(b), but we consider that a showing of prejudice to the defendant's rights is also indispensable to a request that the court exercise its discretion and appoint private counsel under section 4 of the Public Defender Act (Ill. Rev. Stat. 1983, ch. 34, par. 5604).

Our review of the record shows that the defendant did not suffer prejudice to any of his rights by the public defenders' representation. A qualifying accused has, of course, the constitutional right to have counsel appointed, but that does not include the right to select counsel for appointment. (People v. Lewis (1981), 88 Ill. 2d 129,

160; People v. Cox (1961), 22 Ill. 2d 534, 537, cert. denied (1963), 374 U.S. 855, 10 L. Ed. 2d 1076, 83 S. Ct. 1925.) In addition, it is clear that an accused cannot exercise his right to the appointment of counsel to delay trial or impede the effective administration of justice. (People v. Taylor (1984), 101 Ill. 2d 508, 523; People v. Friedman (1980), 79 Ill. 2d 341, 349.) Here it is apparent that Ahlemeyer and Skelton performed competently before and during trial despite their unhappy position of being between the defendant's wish that they be discharged and the court's insistence that they remain as counsel. As early as the time of arraignment the defendant stated that he did not want representation by the public defender; yet he never presented an instance when his rights were prejudiced, despite ample opportunity to do so if prejudice existed. In the letters and motions [*404] concerning the defendant's discontent with Ahlemeyer, Hall made vague and unsubstantiated claims that "community ties" and a "reliance with the State's Attorney" would interfere with Ahlemeyer's representation [**1346] [***333] of him. He complained of inadequate trial preparation by Ahlemeyer, yet he refused to meet with counsel to assist in the preparation of his defense. Hall refused the court's offer to appoint McLean County Public Defender Skelton to assist Ahlemeyer; he then asked that Skelton be appointed and soon after expressed his dissatisfaction with Skelton. The record clearly shows that the defendant embarked on a deliberate course designed to delay and disrupt his trial, and error cannot be reasonably found in the court's denial of a substitution of counsel. Cf. People v. Taylor (1984), 101 Ill. 2d 508, 523, and People v. Myles (1981), 86 Ill. 2d 260, 269-71 (defendant estopped from asserting

ineffective assistance of counsel when claim arises from defendant's lack of cooperation).

After the defendant struck the judge and counsel in the conference room, he brought a motion for a mistrial and requested that the court, before ruling on the motion, question the jurors to determine if any heard the altercation. Hall's next contention is that he was unable to make a knowing or intelligent waiver of a jury at the guilt phase of his trial following the court's refusal to question the jury. He argues that it was impossible to ascertain whether the jury was prejudiced against him, and therefore he was deprived of a meaningful choice between a jury or bench trial. The State's response is that the defendant should not be permitted to create reversible error by his own misconduct.

In United States v. Chaussee (7th Cir. 1976), 536 F.2d 637, the Court of Appeals for the Seventh Circuit found no abuse of discretion when the district court denied a mistrial motion after the jury witnessed the defendant's unsuccessful attempt to escape. The court observed:

> [*405] "Even though it may be a defendant's own misconduct which jeopardizes the fairness of his trial, the trial court, however, remains under a burden to use all reasonable means under the circumstances to insure a fair trial. That responsibility will require responses from the court tailored to the peculiar circumstances." 536 F.2d 637, 641.

Here the court found that at the time of the incident the door to the conference room was closed, that the jury was in the jury room under the control of a bailiff, that none of the jurors were in the corridor, and that none of the jurors witnessed the incident. We agree with the trial court's conclusion that "the integrity of the jury was

intact." The trial court has broad discretion to determine the propriety of declaring a mistrial (Illinois v. Somerville (1973), 410 U.S. 458, 35 L. Ed. 2d 425, 93 S. Ct. 1066), and we judge that the court's denial of the request that the jury be questioned was proper.

Though, as we shall discuss later, the defendant stated that he did not want the judge to transfer the case to another judge for sentencing, he contends that he was denied a fair trial when Judge Caisley refused to transfer the case to another judge after he was struck by the defendant. Hall says that the judge was obligated to recuse himself if he believed that his impartiality might reasonably be questioned, or if the circumstances at trial created an appearance of bias. ABA Standards, Special Functions of the Trial Judge, Circumstances Requiring Recusation, sec. 6—1.7 (1986), ABA Code of Judicial Conduct sec. 3(C)(1)(1986); People v. Wilson (1967), 37 Ill. 2d 617.

The legislature provided for substitution of judges in section 114—5(c) of the Code of Criminal Procedure of 1963. (Ill. Rev. Stat. 1983, ch. 38, par. 114—5(c).) Section 114—5 creates an absolute right to substitute judges if the defendant's request is made within 10 days after his cause is placed on the judge's trial docket, but subsection [*406] (c) states that, after the 10-day period, a "defendant may move at any time for substitution of judge for cause, supported by affidavit." (Ill. Rev. Stat. 1983, ch. 38, par. 114—5; People v. Peter (1973), 55 Ill. 2d 443, 458.) The burden of establishing cause under the section, we have held, rests with the defendant, and [**1347] [***334] the trial court is not required to justify retaining the case. (People v. Vance (1979), 76 Ill. 2d 171, 178 citing People v. Nickols (1976), 41 Ill. App. 3d 974, 979.)

The trial court is in the best position to determine whether it has become prejudiced against the defendant. 76 Ill. 2d 171, 178; People v. Polk (1973), 55 Ill. 2d 327, 336.

Judge Caisley, in denying the defendant's request that he recuse himself, stated:

> "[T]he interest of proceeding to justice, the administration of justice[,] requires that there be a certain element of courage to go forward and to see that justice is fairly and impartially administered[,] and the fact that I have been struck by the defendant is a matter that is within his control but it is a matter within my control whether I allow that to prejudice me, and I have determined in my own mind that I shall not allow that to prejudice me in any way and that I will be completely fair and impartial in this case * * *."

An examination of the record fails to show any unfairness to the defendant or want of even-handedness. The record confirms the assurances given by the court that it would provide Hall a fair trial. Hall, as stated above, has the burden of establishing cause under the section (People v. Vance (1979), 76 Ill. 2d 171, 178), and he has simply failed to meet that burden.

The actions of the defendant in striking his attorney and the trial judge were certainly outrageous and called for extraordinary detachment on their part. Despite the gravest of provocations the attorney and the judge, as we have observed, carried out their responsibilities with [*407] professional competence and, considering the circumstances, even grace. We cannot presume a failure of impartiality of a trial judge even under extreme provocation. Judges are called upon to preside over the trial of

onerous causes and persons. By definition, however, a trial judge is required to ignore provocations and pressures, whether public or from individuals. The record shows that the trial judge's conduct here was entirely proper. He correctly noted that the administration of justice requires the courage to insure that justice is fairly and impartially administered. The judge could easily have stepped aside without criticism and had the cause tried by another judge, even though it was predictable that a claim of double jeopardy might subsequently be raised. To hold that the law requires a substitution of judges under circumstances similar or comparable to those here would invite misconduct toward judges and lawyers, and a practice would develop that the grosser the misconduct the better the chances to avoid trial with an undesired judge or lawyer.

In a related argument, Hall contends that he was denied the effective assistance of counsel because his attorneys failed to file a written motion supported by affidavit for a substitution of judge under section 114—5(c). Specifically, the defendant argues that defense counsel "could easily have established the underlying facts of [the defendant's] attack on the judge by affidavits," which, the defendant says, would have been sufficient to establish cause under the section.

The court, however, was well aware of the factual basis underlying the request for recusal, heard extensive argument on the question, and carefully set out its reasons for denying the request. We fail to see how the motion's being in writing supported by affidavit could have had a different result. The Supreme Court has stated: "If it is easier to dispose of an ineffectiveness claim on [*408] the ground of lack of sufficient prejudice, which we expect

will often be so, that course should be followed." (Strickland v. Washington (1984), 466 U.S. 668, 697, 80 L. Ed. 2d 674, 699, 104 S. Ct. 2052, 2070; People v. Del Vecchio (1985), 105 Ill. 2d 414, 426.) Moreover, an attorney's performance will not be said to be deficient due to a failure to bring a futile motion. People v. Kub[illegible]983), 94 Ill. 2d 437, 485; [**1348] [***335] People v. Lewis (1981), 88 Ill. 2d 129, 156.

The defendant's only challenge to the sufficiency of the evidence is in a pro se supplemental brief. He argues that circumstantial evidence, based in part on testimony of witnesses whose trial testimony contradicted earlier statements given to investigating officers, is insufficient to establish his guilt beyond a reasonable doubt. Hall observes that inmates Juan McGee and Derrick McGee each testified that the victim was last seen with the defendant near the cold-storage area and that Hall had blood on his shirt a short time later. He correctly points out that this testimony was inconsistent with the statements they gave corrections officers Russell Nelson and Herbert Givens the day after the murder. Juan McGee told Nelson and Givens that he did not know anything about King's death, and Derrick McGee refused to tell Nelson what he knew out of fear for his safety. Similarly, the defendant argues that inmate Ronald Louis lacked credibility because he testified that King never brought him the cheese he requested for the bacon sandwiches he was preparing, yet just after King's murder he told investigator David Brubaker that King had brought him the cheese. Hall also contends that Louis told Brubaker that he knew that the defendant had blood on his shirt from what another inmate had told him, yet at trial Louis insisted that he was testifying from his personal

knowledge. Finally Hall challenges the time sequence constructed by the testimony of inmate Michael Hughes [*409] because it was not consistent with that established by the testimony of Lieutenant Gary Neale Moore.

We first observe that a conviction can be sustained on circumstantial evidence, and the trier of fact is not required to disregard the inferences to be drawn from the evidence in order to find guilt beyond a reasonable doubt. (People v. Albanese (1984), 104 Ill. 2d 504, 514; People v. Williams (1968), 40 Ill. 2d 522, 526, cert. denied (1969), 393 U.S. 1123, 22 L. Ed. 2d 129, 89 S. Ct. 1004.) Too, the trier of fact does not have to be satisfied beyond a reasonable doubt as to each link in the chain of circumstantial evidence; it is sufficient if all the evidence, taken together, satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. People v. Bernette (1964), 30 Ill. 2d 359, 367.

Here the defendant asserts that certain testimony should be disregarded as incredible because the witnesses were impeached by prior inconsistent statements. However, he ignores the fact that each witness gave statements to investigating officers several months later that were consistent with their trial testimony, and that each explained that they were initially reluctant to cooperate with authorities because of fear of reprisal in the institution. Significantly, Hall does not challenge the testimony of the corrections officers who also placed him in the area just before the murder and also observed blood on his clothing just after King's disappearance became known. The defendant does not address the evidence of the victim's blood on his clothing; the testimony of Officer Delaney that the defendant alone knew King had been strangled; and Koch's testimony that Hall, in re-

sponse to her question as to the whereabouts of King, indicated that she was in the closet near the cold-storage area. The defendant's theory that King was murdered by Davis was refuted in that there was no evidence that Davis ever left the kitchen area to go to the cold-storage [*410] area or that he was with King around the time she was murdered. No blood was found on Davis. The defendant's attack on the credibility of four witnesses does not raise a reasonable doubt as to his guilt. This court will not reverse the trial court's determination of the credibility and sufficiency of the evidence unless the evidence is so improbable as to create a reasonable doubt of guilt. People v. Davis (1983), 95 Ill. 2d 1, 27; People v. Novotny (1968), 41 Ill. 2d 401, 412.

[**1349] [***336] The defendant challenges his waiver of a jury at sentencing as improper. Just after the judgment of guilty was entered, the State reminded the court that it had requested a death penalty hearing under section 9—1(d) of the Criminal Code of 1961 (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(d)), and asked that the defendant be directed to choose whether he wished to be sentenced by jury or to proceed to a hearing before the trial court. Defense counsel in response asked that a date be set for sentencing and assured the court that the defendant would make a decision before that date. The court said that a decision was needed that day because there were already impaneled "14 jurors who have been qualified." Defense counsel objected to that jury being used at sentencing, arguing that because they were discharged "there is no longer a jury in the case." The court ordered a recess until that afternoon.

Upon reconvening, the defendant was asked to state whether he wanted to be sentenced through a trial court

hearing or by a jury. The defendant stated that he did not wish to be sentenced by a jury. The court admonished him that it would be charged with making findings of law and fact and that the court would determine his sentence. The defendant said that he understood and the court accepted his jury waiver.

On April 17, 1984, just as the sentencing hearing was to begin, the defendant asked that his waiver of a jury [*411] be withdrawn because at the time he waived the jury he was unaware that to impose the death penalty the jury's decision had to be unanimous. The court, stating that the defendant had been instructed as to his rights under the sentencing provisions of section 9—1 (Ill. Rev. Stat. 1983, ch. 38, par. 9—1) and noting that a jury had already been discharged, held that the defendant could not at that point withdraw his waiver.

He argues that he did not knowingly or intelligently waive his right to a jury at sentencing because he was never admonished by the court or informed by counsel that a jury's decision to impose the death penalty must be unanimous. He cites People v. Albanese (1984), 104 Ill. 2d 504, 535, for the proposition that the sixth amendment requirement that a jury waiver be knowingly and intelligently made applies to the sentencing provisions of section 9—1(d) (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(d)).

In People v. Brownell (1980), 79 Ill. 2d 508, 536, and in People v. Albanese (1984), 104 Ill. 2d 504, 535, this court declined to adopt a rule expressly requiring our trial courts to advise defendants at capital sentencing hearings of the unanimity-of-decision requirement before accepting a jury waiver. In Albanese, the court said that "the sixth amendment requires no precise formula for

determining whether a waiver had been knowingly and intelligently made. Each case will turn on its own facts and circumstances." (104 Ill. 2d 504, 535-36.) (See also People v. Madej (1985), 106 Ill. 2d 201, 220-21; People v. Taylor (1984), 101 Ill. 2d 508, 520.) The record refutes the defendant's claim that he did not knowingly and intelligently waive a jury at sentencing. As early as the prosecution's opening statement, the defendant expressed a preference that the court determine his guilt or innocence, and, if necessary, determine his sentence. He said, "I don't want a jury, period, in any phase of this trial. I want to be dealt with by you [Judge Caisley]." [*412] Advised by the court that a jury waiver for sentencing at that stage was premature, the defendant continued to insist that Judge Caisley preside at the sentencing hearing. He said that he did not want Judge Caisley to transfer sentencing to another judge because the defendant had struck Judge Caisley. Hall observed that he "would feel comfortable in knowing that [the court is] going to determine it all the way, if it does get there." (This is perhaps explained in the text of a letter addressed to Judge Caisley and made part of the record. The defendant [**1350] [***337] observed in the letter that defense counsel had commented that Judge Caisley had the reputation of being opposed to the death penalty.) Too, before the court accepted the jury waiver it admonished Hall of his rights under the sentencing provisions of section 9—1(d) (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(d)), informed him that it would consider the evidence presented at the hearing and that it would determine his sentence. The defendant stated that he understood his rights and the consequences of a jury waiver; the court accepted the waiver. It is apparent that

the requirement that a jury reach a unanimous decision on the death sentence played no part in Hall's jury waiver, and we will not find error in the court's failure to admonish the defendant of the requirement.

We also note that there is a similarity between the case here and People v. Albanese (1984), 104 Ill. 2d 504, so far as the experience background of the defendants is concerned. In Albanese it was observed that the defendant, who had already been sentenced to death by jury for a related murder, was no doubt familiar with the function of a jury at a capital sentencing hearing. (104 Ill. 2d 504, 536.) Here, of course, while the defendant was faced with his first capital sentencing hearing, he had had the experience of four felony convictions. Two of these came through pleas and two through trials. It is [*413] reasonable to conclude that the defendant was familiar with the nature of decision by jury.

Hall also contends that his jury waiver was not knowingly or intelligently made because, he says, it was premised on the erroneous ruling that the same jury that was dismissed before the start of evidence would be the jury used at the sentencing hearing if the defendant chose sentencing by jury. He argues that that jury does not fall within any of the following sentencing provisions of section 9—1(d) of the Criminal Code of 1961:

"The [sentencing] proceeding shall be conducted:

1. before the jury that determined the defendant's guilt; or

2. before a jury impanelled for the purpose of the proceeding if:

A. the defendant was convicted upon a plea of guilty; or

B. the defendant was convicted after a trial before the court sitting without a jury; or

C. the court for good cause shown discharges the jury that determined the defendant's guilt; or

3. before the court alone if the defendant waives a jury for the separate proceeding." Ill. Rev. Stat. 1983, ch. 38, par. 9—1(d).

As discussed above, it appears that Hall, as a tactical matter, chose to be sentenced by the court, and consequently it cannot be reasonably said that he based his jury waiver on a concern that the jury discharged earlier would determine his sentence. In any event, the record shows that the court never decided that the same jury would have sentenced the defendant.

The record shows that defense counsel objected to the use of the impaneled jury for sentencing, and the prosecution agreed that, if sentencing was to be by jury, defense counsel might want to raise "certain issues relative to the previous jury that [had] been selected." The prosecution pointed out that if the defendant chose to be [*414] sentenced by the court, there would be no need to "argue the pros and cons" of using that jury. The court did not rule on the question and ordered a recess until that afternoon. Upon reconvening, there was no further discussion about whether the jury already impaneled could sit in determination of the defendant's sentence. No attempt was made to ascertain whether it was, in fact, the court's decision to use the same jury should the defendant elect sentencing by jury. Because the defendant did not obtain a ruling on the question, he cannot now complain that the court erred. (People v. Mack (1984), 105 Ill. 2d 103, 132.) Consequently, the contention that the defendant's jury waiver was not knowingly

or [**1351] [***338] intelligently made because it was premised on an "erroneous ruling" is untenable.

Hall also contends that the court improperly denied his motion to withdraw the jury waiver because it considered the fact that the jury had been sent home to be a crucial factor in denying his motion to withdraw the jury waiver. It is true that the court expressed its disapproval of the defendant's motion to withdraw the waiver made just moments before the sentencing hearing was to begin. However, it misrepresents the record to say that the court considered the fact that the jury had already been sent home as an influencing factor. The record reveals that the court reviewed circumstances surrounding the defendant's various demands that the trial proceed without a jury, paying particular attention to the defendant's waiver of a jury at sentencing, and concluded that a sentencing hearing before a jury was "a right he has knowingly and intelligently given up." The question of whether a jury waiver may be withdrawn rests within the discretion of the trial court unless the circumstances indicate the defendant was unaware of the consequences of the waiver. People v. Catalano (1963), 29 Ill. 2d 197, 202, cert. denied (1964), 377 U.S. 904, 12 L. Ed. 2d 176, [*415] 84 S. Ct. 1164; People v. Jones (1976), 42 Ill. App. 3d 353, 356.

Hall next argues that the court misconstrued our death penalty statute as precluding "an individual decision" on whether to impose the capital sentence. He claims the court resisted its personal inclination to show mercy in sentencing the defendant, and that therefore the death sentence was imposed contrary to the Supreme Court's decision under the eighth amendment that, because "the imposition of death by public authority is so profoundly

different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases." Lockett v. Ohio (1978), 438 U.S. 586, 605, 57 L. Ed. 2d 973, 990, 98 S. Ct. 2954, 2965.

Upon the close of evidence and after hearing argument, the judge said he was faced with a choice between justice or mercy. The judge said, "If the choice were mine to make individually I would make a choice on the side of being merciful in sentencing this defendant to a term of life imprisonment." The judge observed, "I have taken an oath to administer the laws of the State of Illinois in a manner that I best can," and then sentenced the defendant:

> "I think all the aggravating factors are stacked against the defendant. I think there has been a complete absence of mitigating factors. I am persuaded there is no reasonable doubt here, and so it is my unhappy duty under the laws of the State of Illinois to sentence Anthony Hall to death."

Confronted with the most melancholy of all judicial responsibilities the trial judge, though his personal choice would have been to impose a sentence of imprisonment, imposed the sentence he concluded our law required.

Our death penalty statute mandates that the sentencing body consider "any mitigating factors which are relevant [*416] to the imposition of the death penalty." (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(c); People v. Madej (1985), 106 Ill. 2d 201, 222.) This court has acknowledged that mercy is a relevant factor for consideration at a capital sentencing hearing, but it is to be considered within the context of all factors in aggravation and mitigation. (People v. Holman (1984), 103 Ill. 2d 133, 170.) Here the court stated that it considered all the evidence

in aggravation and mitigation, but it said there was a "complete absence of mitigating factors," the presence of which would have enabled the court to show mercy and impose a sanction other than the death penalty. We cannot accept the defendant's contention that the court erroneously construed the statute to preclude considerations of mercy, but rather we believe that the court properly considered all factors in mitigation and aggravation before reaching judgment as to a sentence.

[**1352] [***339] The defendant next complains that he was denied the opportunity to confront witnesses against him at sentencing when the court allowed into evidence the hearsay testimony of Ronald Umbdenstock, a correctional officer at Menard Correctional Center. Umbdenstock's testimony was that Hall and two other inmates at Menard were involved in a fight with another inmate in which the victim was stabbed. Hall and his accomplices, he said, attempted to throw their victim off the prison gallery.

Section 9—1(e) of our death penalty statute allows the introduction of evidence during the sentencing hearing that would not ordinarily be admissible during the guilt phase of a trial. (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(e); People v. Lyles (1985), 106 Ill. 2d 373, 414; People v. Free (1983), 94 Ill. 2d 378, 421-27.) The factors controlling the admissibility of evidence at a capital sentencing hearing are relevance and reliability, and the determination of admissibility rests in the discretion of the trial [*417] court. (People v. Eddmonds (1984), 101 Ill. 2d 44, 65; People v. Davis (1983), 95 Ill. 2d 1, 43.) Hearsay testimony will not per se be deemed to be inadmissible at a sentencing hearing as denying a defendant's right to

confront witnesses. People v. Perez (1985), 108 Ill. 2d 70, 86; People v. Brisbon (1985), 106 Ill. 2d 342, 365.

In People v. Perez (1985), 108 Ill. 2d 70, a corrections officer was allowed to testify at the sentencing hearing that he had been cautioned by his superior that he should be careful around the defendant. The superior officer had been informed by an inmate that the defendant had threatened to harm the witness. We held the hearsay testimony to be relevant as an aggravating factor because it tended to establish that the defendant was a threat to the safety of others. We said the evidence was reliable because it was corroborated by the witness' testimony that the defendant had also directly threatened him. (108 Ill. 2d 70, 85-87.) Just as in Perez, we consider the testimony that Hall had exhibited violent and criminal behavior while incarcerated at Menard to be relevant as an aggravating factor. Further, we do not question the reliability of the testimony because the defendant did not claim at trial that the incident did not occur, nor did he deny that sanctions were imposed at the disciplinary proceeding that resulted from the incident. In fact, it was during the defendant's cross-examination of the witness that it was brought out that the defendant lost 10 months of "good time" because of his involvement. See also People v. Brisbon (1985), 106 Ill. 2d 342 (hearsay testimony that the defendant had been charged in an earlier murder, but that the charges were dismissed for want of probable cause, admissible at sentencing hearing as relevant to defendant's unprosecuted misconduct).

The defendant complains of an improper remark in the State's closing argument. He says that the prosecution

attempted to appeal to the emotions of the court [*418] when it argued:

> "Your honor, on behalf of the People of the State of Illinois and Livingston County, the director and staff and personnel of the Department of Corrections, I am asking you to let, in this case, the punishment fit the crime and there is only one avenue left based on the statutory considerations and based on the serious and heinous nature of this case and that is for the court to set an execution date."

Hall asserts that the reference to employees at the Department of Corrections was an improper appeal to emotion condemned in People v. Szabo (1983), 94 Ill. 2d 327, 363-67. Hall, in support of his argument that the court was improperly influenced at sentencing, submits that unsolicited letters, sent to the court by personnel of the Centralia [**1353] [***340] Correctional Center, which asked that the defendant be sentenced to death also were an appeal to the court's emotions.

The State correctly notes, however, that the defendant's failure to object to the remark in closing argument served to waive consideration of the question on appeal. (People v. Lewis (1981), 88 Ill. 2d 129, 149; People v. Carlson (1980), 79 Ill. 2d 564, 575-78.) Apart from the waiver, we judge on the merits that a new sentencing hearing is not required. We would consider it unrealistic to say that the prosecutor's remark and the unsolicited letters affected the experienced trial judge's decision to impose the death penalty.

The focus of a capital sentencing hearing is on the character and record of the defendant and the facts and circumstances of the crime. While remarks by the prosecutor which are so prejudicial that they serve to divert

the attention of the sentencing body from the offender and the crime are improper (see Woodson v. North Carolina (1976), 428 U.S. 280, 304-05, 49 L. Ed. 2d 944, 961, 96 S. Ct. 2978, 2991; Lockett v. Ohio (1978), 438 U.S. 586, 604-05, [*419] 57 L. Ed. 2d 973, 989-90, 98 S. Ct. 2954, 2964-65; People v. Walker (1982), 91 Ill. 2d 502, 515), one cannot reasonably say that the reference to personnel at the Department of Corrections would divert the attention of the court from a proper consideration of the evidence. Too, we find no prejudicial error in the letters sent by personnel of the Centralia Correctional Center. The court advised defense counsel of the letters and specifically stated that it was not considering the contents of the letters in its deliberations. A trial court will be presumed to have considered only proper evidence and to have disregarded inadmissible evidence in reaching its conclusions (People v. Harris (1974), 57 Ill. 2d 228, 231; People v. Wallenberg (1962), 24 Ill. 2d 350, 354), and there is nothing in the record to rebut the presumption that the court considered only properly admitted evidence in sentencing the defendant to death.

The defendant's final allegation of error at his sentencing is that the court improperly considered as an aggravating factor the fact that there can truly be no compensation for a murder victim or the survivors. The court had stated that "it would be impossible to compensate anyone for the loss of their life or to compensate members of the family." If, as the defendant claims, the court considered the impossibility of compensation as an aggravating factor, we do not consider that it was a significant factor in light of the court's recital of aggravating factors. The court noted that the defendant had to have "contemplated" the murder because he carried the

knife to the cold-storage area; that the number of wounds was evidence that his victim suffered a brutal death; that Hall used his assignment in the inmate kitchen to commit the murder; and that the defendant has a substantial prior history of criminal conduct.

Finally, the defendant presents a number of constitutional challenges to this State's death penalty statute [*420] which have already been considered and rejected. This court has held that the statute does not allow unbridled or unguided discretion to the prosecution in deciding whether to seek imposition of the death penalty. (People v. Free (1986), 112 Ill. 2d 154, 162; People v. Lewis (1984), 105 Ill. 2d 226, 252; People v. Kubat (1983), 94 Ill. 2d 437, 501; People ex rel. Carey v. Cousins (1979), 77 Ill. 2d 531, cert. denied (1980), 445 U.S. 953, 63 L. Ed. 2d 788, 100 S. Ct. 1603.) It has been decided that the statute does not arbitrarily or capriciously limit imposition of the sentence to certain defendants (People v. Walker (1985), 109 Ill. 2d 484, 509; People v. Stewart (1984), 104 Ill. 2d 463, 499-502) and does not impose on the defendant the burden of [**1354] [***341] proving that the death penalty was inappropriate (People v. Del Vecchio (1985), 105 Ill. 2d 414, 446; People v. Albanese (1984), 104 Ill. 2d 504, 541-42; People v. Brownell (1980), 79 Ill. 2d 508, 538). The prosecution is not constitutionally limited to aggravating evidence which has been disclosed to the defendant prior to trial, nor is the sentencing body constitutionally required to specify in writing the aggravating factors upon which the death sentence was based (People v. Albanese (1984), 104 Ill. 2d 504, 540-41). The sentencing body must, however, determine that the aggravating factors exist beyond a reasonable doubt (People v. Free (1983), 94 Ill. 2d 378,

427, cert. denied (1983), 464 U.S. 865, 78 L. Ed. 2d 175, 104 S. Ct. 200). The contention that a statute is constitutionally infirm because it fails to provide for comparative review of capital cases has been rejected. Pulley v. Harris (1984), 465 U.S. 37, 47-48, 79 L. Ed. 2d 29, 39-40, 104 S. Ct. 871, 879; Jurek v. Texas (1976), 428 U.S. 262, 276, 49 L. Ed. 2d 929, 941, 96 S. Ct. 2950, 2958; People v. Walker (1985), 109 Ill. 2d 484, 508; People v. Stewart (1984), 104 Ill. 2d 463, 499; People v. Silagy (1984), 101 Ill. 2d 147, 161; People v. Williams (1983), 97 Ill. 2d 252, 266.

[*421] For the reasons given, the judgment of the circuit court of McLean County is affirmed. The clerk is ordered to enter an order setting Tuesday, the 20th day of January, 1987, as the date on which the sentence of death, entered by the circuit court of McLean County, shall be carried out. The defendant shall be executed by lethal injection in the manner provided by section 119—5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 119—5). A certified copy of the mandate in this case shall be furnished by the clerk of this court to the Director of Corrections, to the warden at Stateville Correctional Center and to the warden of the institution wherein the defendant is confined.

Judgment affirmed.

CONCUR BY: SIMON (In Part)

DISSENT BY: SIMON (In Part)

DISSENT: JUSTICE SIMON, concurring in part and dissenting in part:

I would affirm the defendant's conviction.

So far as the death sentence is concerned, it is quite clear that the trial judge believed that he was precluded from considering mercy in determining whether to impose the death penalty. Equally clear is that his decision would have been different had he considered mercy. He said: "If the choice were mine to make individually I would make a choice on the side of being merciful in sentencing this defendant to a term of life imprisonment." The judge apparently regarded this choice as foreclosed, however, by his oath to administer the laws of the State. Under this view of the law, he found that "there has been a complete absence of mitigating factors" and so imposed the sentence of death.

As the majority acknowledges, mercy is a relevant factor in mitigation at the death penalty hearing. (114 Ill. 2d at 416; People v. Holman (1984), 103 Ill. 2d 133, 170.) Had a jury deliberated on the sentence, the death penalty could not have been imposed if a single juror believed [*422] that mercy was appropriate in the circumstances. The circuit judge was therefore mistaken in thinking that mercy could not enter into his determination. The majority's conclusion that the judge "properly considered all factors in mitigation and aggravation" (114 Ill. 2d at 416) cannot be squared with the judge's own explanation of his decision. Since his finding that there were no factors whatever in mitigation was clearly founded upon an incorrect understanding of the law, the sentence should be vacated.

An independent reason why this death sentence cannot stand is that the defendant was never admonished prior to waiving a [**1355] [***342] jury for sentencing that

such a jury would have to be unanimous in order to impose the death penalty. As I have stated before (People v. Buggs (1986), 112 Ill. 2d 284, 296 (Simon, J., specially concurring); see also People v. Morgan (1986), 112 Ill. 2d 111, 150 (Simon, J., dissenting)), fundamental fairness dictates that trial judges correctly admonish capital defendants as to the unanimity rule. In Buggs and Morgan the court rejected the contention that a proper admonition on unanimity was a prerequisite to a knowing and intelligent waiver of a sentencing jury, and relied on the fact that the defendants in those cases had conferred with counsel prior to tendering their waivers. (People v. Buggs (1986), 112 Ill. 2d 284, 293; People v. Morgan (1986), 112 Ill. 2d 111, 141.) Here, though, the defendant stated to the judge prior to the commencement of the sentencing hearing that counsel had not informed him of the unanimity requirement. The court's disposition of this issue appears especially indefensible in this case because the defendant actually tried to retract his waiver prior to the sentencing hearing. It cannot therefore be said that he was waiting to see what sentence the judge would impose before challenging the voluntariness of his jury waiver.

[*423] In support of its decision that the defendant's waiver was knowing and intelligent, the majority finds it "reasonable to conclude that the defendant was familiar with the nature of decision by jury" because of his prior felony convictions (114 Ill. 2d at 413). But the "nature" of the decision by a capital sentencing jury differs from that of an ordinary trial jury, with which the defendant had some previous experience, on the very point at issue here: the consequence of a single juror dissenting. In a felony trial, if one juror votes not guilty,

the defendant is not acquitted, but a mistrial is declared and the prosecution can start over with a new jury. A single capital sentencing juror voting against the death penalty results, however, in the defendant's "acquittal" of the death sentence (see Poland v. Arizona (1986), 476 U.S. 147, 153, 90 L. Ed. 2d 123, 131, 106 S. Ct. 1749, 1754). Far from providing any meaningful basis for the decision whether to waive the jury for sentencing, the defendant's prior experience with the jury system may actually have misled him on the consequences of a lack of unanimity. This case therefore bears no similarity to People v. Albanese (1984), 104 Ill. 2d 504, in which the defendant had previously been sentenced to death by a jury in a related case before tendering the sentencing jury waiver at issue there.

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Supreme Court, U.S.
FILED
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No. 97-188

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

ODIE WASHINGTON, Director,
Illinois Department of Corrections,

Petitioner,

v.

ANTHONY EARL HALL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Anthony Hall asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari and to proceed *in forma pauperis*. Petitioner has been granted leave to so proceed in both the U.S. District Court and the U.S. Court of Appeals. Pursuant to Rule 39.1, no affidavit is attached, inasmuch as the U.S. Court of Appeals appointed counsel for Petitioner under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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On Petition for Writ of Certiorari to the
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for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Anthony Hall respectfully requests that this Court deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (Wood, J.; Cummings, J.; and Rovner, J.)

STATEMENT OF THE CASE

While the Respondent's Statement of the Case is essentially correct, some additional facts may prove helpful to the Court in its consideration of the State of Illinois' Petition for Writ of Certiorari.

Following Anthony Hall's conviction of murder, he waived his state right to jury sentencing. Following the jury waiver, the trial court allowed defense counsel six weeks to prepare for the bench sentencing hearing. During this six-week period, neither attorney

visited Mr. Hall to prepare for sentencing. Indeed, neither attorney claimed even to have spoken with Mr. Hall during this same period. Calls to defense counsel from individuals offering to testify on Mr. Hall's behalf at sentencing were not returned.

Prior to commencement of the sentencing hearing, Mr. Hall informed the court that, (during the six week period when his attorneys had not been in touch with him) he had spoken with another attorney who had explained Illinois' jury sentencing scheme and that he wished to withdraw his earlier waiver. Mr. Hall's request was denied.

At the sentencing proceeding, defense counsel called three witnesses: Mr. Hall, whose testimony the court had found incredible at trial; a psychiatrist who testified that Mr. Hall was anxious about the possibility of being sentenced to death; and a combination dentist, part-time Jehovah's Witnesses minister who testified that, prior to being charged with murder, Hall had attended Bible study classes for a period of time while incarcerated.

Defense counsel's closing argument at the penalty stage consisted of a generalized attack on the morality of the death penalty.

Having heard defense counsel's case in mitigation and argument, the trial judge stated that there had been a "complete absence of mitigating factors." (R. 1896) The Illinois Supreme Court endorsed this conclusion on direct appeal. (Appendix D-35, -36)

During state post-conviction proceedings, Mr. Hall claimed that he had been denied effective assistance of counsel at his death penalty hearing and in support of his claim presented evidence, through testimony and affidavits, that 10 individuals[1] would have been

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[1] In its Statement of the Case, Illinois repeats an error of the Illinois Supreme by understating the quantity of the mitigating evidence presented during state post-conviction

willing to testify on his behalf at his capital sentencing hearing but that they had never been contacted or asked to testify by defense counsel. In addition to presenting specific character and background evidence, these individuals would have testified that Mr. Hall had previously saved two lives and possibly a third. Additionally, the testimony of a former prison employee would have shown that while incarcerated Mr. Hall was an asset to Corrections personnel.

In denying Mr. Hall's petition for post-conviction relief, the same judge who had previously determined that there had been a "complete absence" of mitigation, now concluded that the testimony of Mr. Hall's 10 mitigation witnesses would have added nothing to what he already knew about Hall. On post-conviction appeal, the Illinois Supreme Court, which had previously endorsed the trial court's conclusion of "a complete absence of mitigating factors" now endorsed the trial court's conclusion that the evidence of the 10 mitigation witnesses would have been "cumulative." (Appendix C-11)

A three judge panel of the Seventh Circuit unanimously concluded that even under the more deferential review required by the Antiterrorism and Effective Death Penalty Act's amendment to 28 U.S.C. § 2254(d)(1), Mr. Hall was entitled to new sentencing hearing because his attorneys' performance at sentencing had fallen below an objective standard of reasonableness and because he had been prejudiced thereby. A unanimous court denied the

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proceedings. (Cert. Pet. 2-3) The affidavits of eight, rather than six, mitigation witnesses were presented to the State courts in collateral proceedings. (PC C. 696-97 (Thomas O'Connor); PC C. 702-03 (Paula Robinson); PC C. 745-46 (Leola Rodgers); PC C. 350-51 (Claretha Hall); PC C. 699-701 (Patricia Rolf Hunt); PC C. 740-41 (Fate Mikel); PC C. 698 (Julian Smith); PC C. 347-48 (Annie Rodgers)) Because the Illinois Supreme Court does not discuss the proposed testimony of a single mitigation witness in its opinion, it is impossible to discern which affidavits were overlooked by that court and now by the State of Illinois.

State of Illinois' Petition for Rehearing.

REASON FOR DENYING THE WRIT

THIS COURT SHOULD DENY THE WRIT BECAUSE THE SEVENTH CIRCUIT'S UNANIMOUS CONCLUSION THAT MR. HALL IS ENTITLED TO A NEW CAPITAL SENTENCING HEARING FULLY COMPORTS WITH A SIMPLE, STRAIGHTFORWARD APPLICATION OF *STRICKLAND v. WASHINGTON*, 466 U.S. 668 (1984).

The State of Illinois (hereinafter "Illinois") appears to argue that a writ of certiorari is warranted in this case because the Seventh Circuit "far exceeded the proper scope of habeas review" when it substituted its opinion as to whether Mr. Hall was prejudiced by his attorneys failure to present certain mitigating evidence at sentencing for that of the State post-conviction court. (Cert. Pet. at 7) Further, Illinois appears to assert that the Seventh Circuit acted improperly when "[d]espite the sentencing judge's clear statement [(made when ruling on the merits of the ineffective assistance of counsel claim during state post-conviction proceedings)] that the additional mitigation would not have changed his mind, the federal court chose to interpose its own speculation of what the trial court might have done . . . ." Respondent uses the word "appears" because Illinois acknowledges that the deferential standard of review of recently amended 28 U.S.C. § 2254(d)(1) does not apply; seems, at least at one point, to recognize that *Strickland v. Washington*, 466 U.S. 668 (1984) controls; and, at the conclusion of its petition writes (somewhat inconsistently) that "it is now clear that the *de novo* standard was appropriate in this case." (Cert. Pet. at 7, 8, 11)

Whatever the precise nature of the State's argument, it is clear that the Seventh Circuit's analysis squares precisely with that mandated by this Court in *Strickland*. There, the

Court held that whether a habeas petitioner has been prejudiced by defense counsel's substandard performance is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. This holding was recently reaffirmed in *Thompson v. Keohane*, 116 S. Ct. 457, 465 (1995). The Court has also acknowledged that no special deference is owed to State court's assessment of prejudice simply because the issue arises in the context of federal habeas proceedings and that the proper standard of review by the federal court is *de novo*. See *Wright v. West*, 505 U.S. 277, 301-02 (1992) (O'Connor, J. concurring in judgment, joined by Blackmun, Stevens, JJ. (discussion by Justice O'Connor of her opinion in *Strickland*). In fact, in *Strickland* itself, this Court reviewed the prejudice issue *de novo*. *Strickland*, 466 U.S. at 699-700.

Illinois seemingly attempts to circumvent *Strickland* by confusing both the nature of the post-conviction proceedings, and the role of the state court judge in those proceedings. Illinois repeatedly refers to the post-conviction judge (while deciding the legal merits of Mr. Hall's ineffective assistance of counsel claim) as a "factfinder" or "trier of fact" and to the judge's prejudice analysis as a "finding," "factual finding," "finding of fact" or a "reweighing" of the evidence. (Cert. Pet. at i, 3, 7, 8, 9) Significantly, Illinois does not point to a single "basic, primary, or historical fact" which was not accorded the necessary presumption of correctness by the Seventh Circuit, *see Thompson*, 116 S. Ct. at 464. Rather, Illinois complains that the post-conviction's judge's ultimate conclusion that "there [was] no reasonable probability that the sentence would have been different" (Cert. Pet. 5) was not deferred to by the Seventh Circuit. However, as this Court has recognized, the "uniquely legal dimension" of the ultimate issue of prejudice in *Strickland* claims places it outside former § 2254(d)(1)'s domain. *See Thompson,* 116 S. Ct. at 465.

Perhaps Illinois is arguing that, because the judge who sentenced Mr. Hall to death later stated during collateral proceedings that the new mitigation evidence would not have affected his prior decision, the case is distinguishable from, and therefore not governed by, *Strickland*. If this is Illinois' argument, it is without merit as a virtually identical argument was rejected in *Strickland* itself. In *Strickland*, this Court specifically held that the sentencing judge's *post hoc* statements during collateral proceedings concerning as to how new mitigating evidence would or would not have affected his sentencing decision were irrelevant to the prejudice analysis. *Strickland*, 466 U.S. at 695, 700. Thus, in this case, Illinois may not rely on the post-conviction judges' statements during post-conviction proceedings to avoid *Strickland*.

Citing *Lewis v. Jeffers*, 497 U.S. 764 (1990), Illinois further argues that "principles of federalism and comity" require deferential review of the "Illinois sentencing court's "findings of fact and application of its own [death penalty] law." (Cert. Pet. at 8) *Lewis* has no application here. *Lewis* established the test for determining whether, given a facially valid aggravating factor, a state court's finding of death eligibility violates the federal constitution. *Lewis* does not stand for the proposition that federal courts must defer to a state court's answer to the constitutional question. On the contrary, in *Jackson v. Virginia*, 443 U.S. 307 (1979) (which dealt with the analogous question of whether a state court violated the constitution by finding a defendant guilty), the court expressly rejected the argument that deference was owed to state court determinations of the constitutional issue and reviewed the issue *de novo*. *See Wright*, 505 U.S. at 303 (1992) (O'Connor, J. concurring in judgment, joined by Blackmun,

Stevens, JJ.)

As discussed above, the sentencing court's findings of fact and its application of Illinois' death penalty law were never at issue in the federal court proceedings. Rather, Mr. Hall claimed, first in state post-conviction proceedings and then in federal court, that he had been denied his federal constitutional right to effective assistance of counsel at sentencing. The State court answered the federal constitutional question in the negative; the Seventh Circuit conducted an independent analysis as required by *Strickland* and concluded otherwise. This straightforward application of *Strickland* hardly presents the type of issue which can be deemed worthy of certiorari.

In the final paragraph of its Petition, Illinois asserts that this Court's intervention is necessary to clarify the meaning of recently amended 28 U.S.C. § 2254(d)(1). The State twice acknowledges that, under *Lindh v. Murphy*, 1997 U.S. LEXIS 3998, the amended provision does not apply in this case. Thus, the interpretation of § 2254(d)(1) is not a justiciable issue here and would violate Article III's (U.S. Const. art. III) limitation of the federal courts' jurisdiction for at least two reasons. First, there is no "controversy" in this case as required by Article III regarding the proper interpretation of § 2254(d)(1). Article III limits the business of federal courts to questions presented in an adversary context. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). At this time, Mr. Hall has no interest in how the Seventh Circuit, or any court, chooses to interpret the amended provision and therefore has no particular interest in taking an adversarial stance against Illinois. Second, any discussion by this Court of the amended provision would constitute an advisory opinion. As this Court has previously acknowledged, its power lies "to correct wrong judgments and not to revise opinions." *Herb*

v. Pitcairn, 324 U.S. 117, 126 (1945). Where the same result would obtain after correcting an erroneous view of the law espoused by another court, this Court's decision constitutes an advisory opinion which the Constitution does not permit. *Cf. Herb,* 324 U.S. at 124-25 (discussing federal court's jurisdiction to revise erroneous state court opinions).

CONCLUSION

For the foregoing reasons, Respondent Anthony Hall, requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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August 28, 1997

William K. Suter
Clerk, United States Supreme Court
Supreme Court Building
Washington, DC 20543

Re: Washington v. Hall, No. 97-188

Dear Mr. Suter:

Enclosed for filing are the original and ten copies of Respondent Anthony Hall's Motion for Leave to Proceed *In Forma Pauperis*, Brief in Opposition to the Petition for Writ of Certiorari, and Certificate of Service.

Sincerely,

Anne E. Carlson

Anne E. Carlson
One of the Attorneys for Respondent

Enclosures

cc: William L. Browers

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No. 97-188

IN THE SUPREME COURT OF THE UNITED STATES

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ANTHONY EARL HALL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

CERTIFICATE OF SERVICE

The undersigned attorney for Respondent Anthony Hall and member of the Bar of this Court certifies that one copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis* was served by U.S. mail, first class, postage prepaid, to Petitioner's counsel William L. Browers, Assistant Attorney General, 100 W. Randolph Street, Chicago, Illinois 60601, telephone number (312) 814-3565, this 28th day of August, 1997. All parties required to be served have been served.

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